88-502

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

IN RE JACK B. SOLERWITZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, NY 10007
(212) 513-7676

Alan M Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Victoria B. Eiger
Of Counsel

Attorneys for Petitioner
Jack B. Solerwitz

## QUESTIONS PRESENTED FOR REVIEW

I. Whether an attorney can be suspended from practice before a federal appeals court for conduct unbecoming a member of the bar where the conduct at issue was his refusal to withdraw his clients' appeals in the face of tremendous pressure by the court to do so and where three respected experts on legal ethics testified that he was ethically obligated to pursue the appeals and that the appeals and the briefs were not frivolous.

II. Whether an attorney is entitled to procedural safeguards such as a hearing before an impartial tribunal when a Court of Appeals seeks to impose against him serious disciplinary sanctions for alleged misconduct in and directed at the Court of Appeals itself.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

RULES INVOLVED.....vi

OPINION BELOW.....vii

JURISDICTION OF THE COURT.....viii

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT.....23

POINT I THE COURT OF APPEALS' RULING IMPROPERLY MAKES ATTORNEYS SERVE AS GATEKEEPERS FOR THE COURT.....25

POINT II AN ATTORNEY MAY NOT BE SUBJECTED TO SERIOUS DISCIPLINARY SANCTIONS WITHOUT PROCEDURAL SAFEGUARDS INCLUDING THE RIGHT TO HAVE THE ISSUES TRIED BY AN IMPARTIAL TRIBUNAL.....33

CONCLUSION.....41

APPENDIX

OPINION OF SENIOR JUDGE
MARION T. BENNETT
(Dec. 20, 1987).....A-1

FINDINGS OF FACT OF
SENIOR JUDGE MARION T. BENNETT
(Dec. 10, 1987).....A-100

DECISION OF THE COURT OF APPEALS
(EN BANC) (June 17, 1988).....A-163

ORDER DENYING
RECONSIDERATION (EN BANC)
(July 20, 1988).....A-202

TABLE OF AUTHORITIES

Bloom v. Illinois,
391 U.S. 194 (1968).....34,35

Codispoti v. Pennslyvania,
418 U.S. 506 (1974).....35

Cooke v. United States,
267 U.S. 517 (1925).....34

In re Bithoney, 486 F.2d 319
(1st Cir. 1973).....28

In re Snyder, 472 U.S. 634 (1985).....27

In re Winsberg, 446 F.2d 641
(9th Cir. 1971).....29

In re Oliver, 333 U.S. 257 (1948).....35

In re Woolfolk 572 F.2d 192
(9th Cir. 1977).....29

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980).....37,40

Mayberry v. Pennsylvania,
400 U.S. 455 (1971).....35

Offutt v. United States,
3482 U.S. 11 (1954).....35

Sacher v. United States,
343 U.S. 1 (1952).....34

Taylor v. Hayes, 418 U.S. 488 (1974)....35

Tumey v. Ohio, 273 U.S. 510 (1927).....40

Ward v. Village of Monroeville,
409 U.S. 57 (1972).....39

Young v. United States,
107 S.Ct. 2124 (1987).....33,35

## RULES INVOLVED

Rule 46 of the Federal Rules of Appellate Procedure provides in relevant part:

> **(b) Suspension or Disbarment.** When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment of the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no responses is made, the court shall enter an appropriate order.
>
> **(c) Disciplinary Power of the Court Over Attorneys.** A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

## OPINIONS BELOW

On December 10, 1987, Senior Judge Marion T. Bennett, who had been designated to conduct a hearing for the Court of Appeals for the Federal Circuit, issued an opinion and findings of fact which are reproduced in the Appendix at A-1 and A-100, respectively. On June 17, 1988, the Court of Appeals for the Federal Circuit (en banc) issued an opinion and order, which are reported at 848 F.2d 1573 and which are reproduced in the Appendix at A-163. On July 20, 1988, the Court of Appeals for the Federal Circuit (en banc) issued an order denying reconsideration, which is not yet reported, but which is reproduced in the Appendix at A-202.

## JURISDICTION OF THE COURT

The order of the Court of Appeals was entered on June 17, 1988. The Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

On January 21, 1987, the United States Court of Appeals for the Federal Circuit (en banc) ordered Petitioner Jack B. Solerwitz, Esq. to show cause why he should not be suspended for two years from representing clients before the Court. The order grew out of Solerwitz's representation of a number of former air traffic controllers ("ATCs") who had been fired as a result of the 1981 strike. The crux of the Court's complaint was that Solerwitz had maintained frivolous appeals on behalf of these clients.

On August 3, 1981, PATCO, the Professional Air Traffic Controller's Organization, called a strike. The strike was declared illegal and 11,000 ATCs were dismissed. Solerwitz was approached by several individual air traffic controllers who were dissatisfied with the representation they

were receiving through PATCO and Solerwitz agreed to represent them. He was thereafter inundated with requests from other ATCs seeking legal representation. Ultimately, Solerwitz and his lawfirm, Solerwitz, Solerwitz & Leeds, undertook representation of over 800 ATCs in proceedings before the Merit Systems Protection Board ("Board").

Because of massive consolidation of cases by the Board, the cases of individual ATCs received little or no individualized consideration in that forum. Persons who never intended to strike -- indeed persons who were wholly unaware of the strike -- found themselves not only without jobs as a result of the mass firings, but without even the satisfaction of having their individual circumstances considered by the Board. This was extraordinarily frustrating for Solweritz's ATC clients, all of whom had lost

their jobs, and many of whom found themselves unemployable, in desperate financial straits and confronted with a myriad of related personal and family problems. Solerwitz's ATC clients continued to hope that they would obtain relief in the Court of Appeals. Accordingly, at his clients' direction, Solerwitz filed petitions for review of adverse Board decisions in the Court of Appeals on behalf of some 700 ATC clients.

The petitions for review filed by Solerwitz were among 4600 requests for review in the Court of Appeals for the Federal Circuit by former ATCs. That Court, apparently, found itself overwhelmed with the addition of so many new cases to its docket. In an attempt to "manage the flood of litigation" (A-4) and to "expedite processing" (Id.), the Court of Appeals consolidated hundreds of ATC cases and, in addition,

selected 12 "lead cases" which presented issues common to many of the cases. The lead cases were put on a fast track. By order dated February 24, 1983, all other pending ATC appeals were "suspended," including those filed by Solerwitz. (A-4-5)

On May 18, 1984, the Court decided the lead cases. On that day the Court sent notices to counsel in all ATC cases that it had decided the lead cases and that if would send further notice upon final disposition of those cases.[1] The Court directed that, within 30 days of such notice, counsel would have to file written notice of a wish to continue to prosecute the appeal or the appeal would be

---

[1] Remarkably, in one of the lead decisions, the Court listed a number of ATC appeals which it had suspended, including one of Solerwitz's, and stated that these appeals would be dismissed -- not affirmed -- unless the Court was notified of an intent to withdraw or further prosecute the case. See Adams v. Department of Transportation, 735 F:2d 488, 494-95 (Fed. Cir. 1984).

dismissed. The notice contained a warning about the impropriety of maintaining frivolous appeals.

On December 10, 1984, the Court notified counsel in all suspended cases that Supreme Court review in those lead cases in which certiorari was sought had been denied. The Court gave counsel in the suspended cases, including Solerwitz, 30 days to file renewed petitions advising the Court of the remaining issues relied upon which had not been decided in the lead cases. The Court again warned counsel against maintaining frivolous appeals. Failure to file a renewed petition would result in dismissal. In addition, counsel were given 60 days from the filing of the renewed petitions to file briefs and appendices.[2]

---

[2]On three other occasions -- July 12, July 31 and August 30, 1985 -- the Court, by memorandum, requested all ATC counsel to
(footnote continued)

The Court's short deadlines and directives created substantial difficulties for Solerwitz's small law firm, which were compounded by a precipitous leavetaking by one of the firm's associates because of a medical emergency. The firm contacted or attempted to contact all of its ATC clients to ascertain whether the client wished to proceed. Because most of the clients had come to Solerwitz for individual representation, not suprprisingly, most expressed their firm desire to proceed with their appeals.[3]

---

(footnote continued from previous page) review the propriety of maintaining frivolous appeals.

[3]Throughout, the firm had kept in close contact with its clients, many of whom, as the firm's lawyers well knew, were enduring personal and family disintegration as a result of the firings. Solerwitz proceeded with the appeals of those relatively few clients who could not be reached in the view that it would be improper to waive the clients' rights without discussing the situation with them.

Pursuant to the Court's order of December 10, 1984, new petitions for review were submitted on January 9, 1985, before the Court's January 10 deadline for doing so.[4]

Throughout the proceedings, the Solerwitz firm attempted to comply fully with the Court's orders. First, the firm's lawyers carefully reviewed the opinions in the lead cases. While those opinions decided many of the major issues involved in the ATC cases, they also revealed that certain important questions had not been decided (e.g., the propriety of consolidation of cases over objection, see Moylan v. Department of Transportation, FAA, 735 F.2d 524 (Fed. Cir. 1984).

---

[4]The Clerk's office inexplicably refused to accept the petitions for filing on the ground that they had been filed individually and not under the consolidated case name and docket number used below. Lawyers worked all night to redo the petitions, and filed them, timely, on January 10.

Moreover, the decisions in the lead cases and the principles announced in those decisions suggested certain issues and factual distinctions which might distinguish individual cases from the lead cases. For example, in Brown v. Department of Transportation, FAA, 735 F.2d 543 (Fed. Cir. 1984), the Court had held that the penalty imposed -- removal -- was inappropriately harsh given the individual ATC's long service and other factors in his case. In reliance on Brown, the firm reviewed all of its clients' files, and identified those where particularly sympathetic fact patterns existed, and advanced those specific facts in support of the argument that the penalty of removal was inappropriate in that case.

Similarly, in Schapansky v. Department of Transportation, FAA, 735 F.2d 477, 482 (Fed. Cir. 1984), the Court had held that absence

without authorization or explanation during the strike constituted a prima facie showing of strike participation, but also noted that minimal countering evidence could overcome that showing. Schapansky and other lead cases suggested the kinds of facts which could rebut a prima facie case of strike participation. For example, the fact that an ATC was on annual leave, Campbell v. Department of Transportation, FAA, 735 F.2d 497 (Fed. Cir. 1984), Letenyer v. Department of Transportation, FAA, 735 F.2d 528 (Fed. Cir. 1984), or had reported sick to his supervisor prior to the strike, DiMasso v. Department of Transportation, FAA, 735 F.2d 526 (Fed. Cir. 1984), or had been forced by threats to participate, Martel v. Department of Transportation, FAA, 735 F.2d 504 (Fed. Cir. 1984), could demonstrate that the ATC was not acting in concert.

In reliance on these lead cases the firm also reviewed all of its clients' cases and identified those in which it was appropriate to argue that the evidence countered the prima facie showing of acting in concert. These specific facts were included in the briefs in support of the claim that reversal was appropriate.

Pursuant to the Court's order of December 10, the briefs for all 600-plus clients were due on or before April 1, 1985. The firm geared up for the work to be done. A new attorney was hired to aid in revising the briefs and 20 legal assistants were hired. Solerwitz's wife and law partner, Kathleen Solerwitz, who had been on maternity leave, returned to work full-time. Everyone in the firm was pressed into service.

The administrative difficulties were considerable, but the firm took appropriate, lawyerly steps to deal with the problems. For example, a motion was made for leave to dispense with the filing of appendices or, alternatively, to file them within 20 days of the filing of respondents' briefs.[5]

Preparation of the briefs for timely submission continued. The briefs which were filed were, for the most part, divided into three sections. The first presented a broad, Constitutional challenge to the prior proceedings. The second raised specific legal claims and, where appropriate, sought to distinguish the lead cases. The third section identified and described the individual

---

[5]Assembling appendices was virtually impossible not only because of the number of cases involved but because the government would not stipulate to contents, or supply necessary documents in its possession.

petitioner and argued why his or her case should be treated differently from the lead cases.

In each case, the United States Court of Appeals for the Federal Circuit affirmed the decision below, without adressing any of the individual distinguishing factors which were raised. In addition, the Court of Appeals found the majority of ATC appeals filed by Solerwitz to be "frivolous," and imposed monetary sanctions under Fed. R. App. P. 38.[6] Sanctions totaling $78,300 were imposed against him, as well as an additional $11,800 in costs and attorneys fees. All of these sums were paid by Solerwitz.

---

[6]The Rule provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

The Court of Appeals, however, apparently felt that it had been wronged by Solerwitz's refusal to bow to its less than subtle demands that he withdraw or permit the dismissal of his clients' appeals. It therefore instituted a separate proceeding against him by order to show cause. It recited that, on five occasions, the Court had warned Solerwitz about the impropriety of mantaining frivolous appeals. And it charged that, notwithstanding the repeated warnings of the Court he had maintained and/or filed 142 separate frivolous appeals in air traffic controller cases.[7]

---

[7]If further charged that in the briefs filed in connection with those appeals he:

> disregarded Federal Rules of Appellate Procedure and this court's rules, failed to file appendices, provided no citations to the record, ignored authorities cited by the government, advanced numerous arguments on issues not on appeal, and repeatedly raised contentions not raised before the Merit Systems Protection Board. Mr. Solerwitz's
>
> (footnote continued)

The order concluded with the allegation that Solerwitz's "conduct in filing and maintaining frivolous appeals . . . has wasted the time and limited resources of this Court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process."

Solerwitz moved to disqualify the Court from ruling on the order to show cause, submitted a written answer to the show cause order, and requested an evidentiary hearing. The Court overruled his procedural objections and designated Senior Judge Marion T. Bennett to hold the hearing.

---

(footnote continued from previous page)
briefs were devoid of any showing on which the decision appealed from could even possibly be reversed, devoid of any basis on which the precedents of this court could be distinguished in law or fact, and devoid of any effort to make such distinctions.

At the hearing, several of Solerwitz's ATC clients testified about their strong desire that Solerwitz file, maintain, and pursue their appeals and their instructions to him that he do so.

Three experts in the field of legal ethics also testified on Solerwitz's behalf. They were Professor Monroe H. Freedman of Hofstra University Law School; Professor William E. Hellerstein, of Brooklyn Law School; and Harvey A. Silverglate, a Boston attorney who co-teaches a course in professional responsibility at Harvard Law School and who chairs the standing committee on legal ethics of the Massachusetts Association of Criminal Defense Lawyers. Each expert had reviewed briefs filed by Solerwitz in ATC appeals which the Court of Appeals had determined to be frivolous and in which that Court had imposed monetary sanctions.

Each of the experts testified that the appeals and the briefs which Solerwitz had filed were not frivolous, and that Solerwitz was not only justified in proceeding with the appeals, but was ethically obligated to do so. Freedman testified that it was not even "a close case. I would expect any expert in the field to agree with me in that judgment." Hellerstein testified that Solerwitz was obligated to proceed and that the Court's warnings about frivolous appeals did not change that bottom line. Silverglate testified that the legal arguments in the Solerwitz briefs were not frivolous. Had Solerwitz consulted him about whether it would be proper to withdraw the appeals on the ground that they were frivolous, Silverglate testified, he would have advised Solerwitz that he had no discretion in the matter. Given his clients' insistence on pursuing

their appeals, and the non-frivolous nature of the arguments, Solerwitz was obligated to pursue the appeals.

Following the hearing, Judge Bennett made findings of fact and concluded that Solerwitz had engaged in conduct unbecoming a member of the bar. He reasoned that attorneys not only have obligations to their clients, but also an obligation to the Court, and rejected the experts' testimony as not taking the latter obligations into account. (A-50)

> The views of the expert witnesses, while based in part on established tenets of the legal profession, do not fully outline the duties of a lawyer nor do they provide a complete picture of the specific issues before the court in this proceeding. An attorney's obligations to provide zealous advocacy on behalf of his client are not absolute and uncompromising, but must be viewed in light of his additional obligations as an officer of the court to promote the administration of justice and to comply with the court's rules, notices, and orders. Additionally, as with his obligations to his client, the attorney's obligations

> to the court are ongoing at every stage of the litigation and the attorney must continually reevaluate the positions advanced in light of both the development of the litigation itself and of the relevant case law affecting the litigation.

A-51-52.

Judge Bennett recommended that Solerwitz be suspended from practice for two years. However, in light of the financial sanctions already imposed on Solerwitz and the fact that this is the first instance in which sanctions would be imposed under both Rule 38 and Rule 46 for conduct arising from the same appeals, Judge Bennett recommended that enforcement of the suspension be held in abeyance for two years pending Solerwitz's demonstration of rehabilitation. (A-85-99)

Solerwitz filed exceptions to Judge Bennett's findings and "appealed" to the en banc Court the determination that Solerwitz had engaged in conduct unbecoming a member of

the bar. He argued that Judge Bennett had not found any of the briefs or appeals frivolous. Rather, Judge Bennett had improperly deferred to the Court's prior findings of frivolousness in connection with the Court's prior imposition of monetary sanctions, thereby making the hearing on the order to show cause meaningless. He urged, in reliance on the experts' testimony, that the briefs and the appeals were not frivolous. He noted that there was a stark difference of opinion between the experts and the judges of the Federal Circuit about what constitutes a frivolous appeal and about the nature of an attorney's obligations to his client. In light of this difference of opinion and in light of the fact that there was no finding of bad faith on Solerwitz's part, he urged that the serious sanction of suspension was inappropriate.

The Court of Appeals for the Federal Circuit, en banc, adopted Judge Bennett's determination that Solerwitz engaged in conduct unbecoming a member of the bar.

> We have reviewed the testimony of the three experts and their conclusions regarding the propriety of Mr. Solerwitz's conduct. We agree with Judge Bennett's conclusion, however, that despite the opinion of those experts, Mr. Solerwitz engaged in conduct unbecoming a member of the bar of this court in his handling of the air traffic controller appeals.
>
> Contrary, to Mr. Solerwitz's contention, it is this court and not Mr. Solerwitz's experts that must determine whether Mr. Solerwitz's conduct was improper. As a member of the bar of this court, Mr. Solerwitz, in Judge Bennett's words, was required to "promote the administration of justice and to comply with the court's rules, notices and orders." On five separate occasions, the court had warned all counsel in the air traffic controller cases against further pursuit of frivolous appeals in cases that could not be meaningfully distinguished from the lead cases. Despite these warnings, Mr. Solerwitz continued to press more than 100 appeals that were frivolous. Mr. Solerwitz cannot

> escape responsibility for his actions by the assertions that his clients insisted that he pursue their appeals and that he believed he could draw adequate factual distinctions between his cases and the lead cases.
>
> The expert witnesses' conclusions were stated in general terms and did not address the specific grounds upon which, in previously imposing the sanctions upon Mr. Solerwitz, this court had concluded that Mr. Solerwitz's appeals were frivolous. It bears repeating that Mr. Solerwitz filed 107 briefs that were virtually identical and that merely repeated the same arguments that this court already had rejected in the lead cases. The purported short factual distinctions he sought to draw between the situations of the former controllers in the 131 cases and those in the lead cases were wholly unconvincing and did not provide any meaningful basis for distinguishing the lead cases.

(A-186-88) The Court, however, "modified" -- really, increased -- the sanction. It fixed the suspension period at one year, but rejected Judge Bennett's recommendation that the suspension be held in abeyance. (A-199-200) The en banc Court stayed the

commencement of the sanctions only for 90 days, so that Petitioner could seek review in this Court. (A-200)

Solerwitz requested reconsideration of the sanction imposed by the en banc Court. He argued that the sanction imposed by the Court was more severe than the sanction which Judge Bennett had recommended, and that he had never had an opportunity to address the Court on the propriety of a harsher sanction. The en banc court ruled that the one-year suspension was a less severe sanction than a two-year suspension which would have been suspended. (A-204) The request for reconsideration was denied. (A-206)

## REASONS FOR GRANTING THE WRIT

This case presents substantive and procedural questions of extraordinary importance not only to all lawyers who practice before the federal courts, but to the court system itself. At its most abstract, the substantive question involves the delicate interplay between a lawyer's obligations to his client and his competing "obligations" to a court. On a more concrete and perhaps more interesting level, the specific question is whether a court can shift to attorneys the responsibility to serve as "gatekeepers" for the Court, insisting that counsel not file (or that counsel withdraw) appeals in cases where, for one reason or another, the Court of Appeals does not want to decide the case, or believes that the outcome is a foregone conclusion.

In addition, the case presents important questions concerning procedural safeguards to which an attorney is entitled when a federal Court of Appeals seeks to impose serious disciplinary sanctions for alleged misconduct directed at the Court of Appeals itself. Among the procedural questions presented are whether, in such circumstances, th charges must be tried by an impartial tribunal or whether they can be adjudicated by the very court which has allegedly been wronged by the attorney's acts.

## POINT I

### THE COURT OF APPEALS' RULING IMPROPERLY MAKES ATTORNEYS SERVE AS GATEKEEPERS FOR THE COURT

Petitioner and the Court of Appeals differ sharply about the respective roles of federal appeals courts and the attorneys who practice before those courts in the administration of justice. Petitioner maintains that it is the responsibility of an intermediate appellate court in the federal system to decide all appeals within its jurisdiction which litigants bring to it. A Court of Appeals may affirm -- must affirm -- a judgment if, in its judgment, the issues raised on appeal are not meritorious or the case cannot be "meaningfully distinguished" from cases recently decided by the Court. It may do so by summary affirmance or other summary procedure, if the Court deems that appropriate.

But, Petitioner submits, the Court may not properly do what the Court of Appeals for the Federal Circuit has done. It may not insist that counsel not prosecute appeals in cases where, as here, although affirmance is likely or indeed, inevitable, counsel believes that certain precedents were wrongly decided, or that the appellant is entitled to relief under the decided cases, or that the particular case is distinguishable from previously decided cases, or even merely in order to preserve the right to seek review in the Supreme Court.

The fact that a Court feels "overwhelmed" with appeals or that chances are high that the Court will find the appeal to be wholly without merit does not change the result. History and the lore of the profession are replete with examples of courageous advocates insistent on representing their clients and

presenting (and preserving) their claims even in the face of very strong expressions by a Court that it did not want to hear a particular argument, or thought the argument meritless. It is, in fact, such advocacy which results in changes in "well-settled" law. But even if the law did not change -- and it clearly does -- pursuing an appeal is appropriate if, for no other reason, than to preserve the issue for further review. In the ATC cases, that was particularly appropriate because this Court had never ruled on any of the issues presented. Indeed, certiorari had not even been sought in several of the lead cases.

Petitioner does not assert any right to file or maintain frivolous appeals, but he does maintain -- based on case law, "the lore of the profession," In re Snyder, 472 U.S. 634, 645 (1985), and the testimony of

thoughtful, respected authorities on legal ethics -- that the phrase "frivolous appeals" describes a very narrow class of cases,[8] into which the appeals at issue did not fall.

The ATC appeals which he filed were not fallacious on their face, nor were they sham appeals. Solerwitz surely was not filing them with ulterior motives and/or with no intention of prosecuting them fully. This case is thus far different from In re Bithoney, 486 F.2d 319 (1st Cir. 1973), the only case of which counsel is aware in which an attorney was suspended from practice for taking frivolous appeals. Bithoney, an attorney who had been convicted on criminal charges, was found to have engaged in conduct unbecoming a member of

---

[8]According to Professor Freedman, a frivolous pleading or argument is one that is fallacious on its face, for example, one that is contrary to that which would be judicially noticed; a sham pleading is plausible on its face, but the attorney asserting it knows or should know that the facts supporting do not exist.

the bar based on his filing of a number of petitions for review in immigration cases (the effect of which was to cause an automatic stay of deportation) and his failure to diligently pursue the appeals, in breach of his obligations to his clients. Even under these circumstances, a suspension of less than six months time was imposed. In fact, nearly all of the cases reported under Fed. R. App. P. 46 involve counsel's failure to file briefs or otherwise discharge his obligations to his client. See, e.g., In re Woolfolk, 572 F.2d 192 (9th Cir. 1977); In re Winsberg, 446 F.2d 641 (9th Cir. 1971). In Solerwitz's case, his offense was his attempt to fulfill his professional obligations to his clients, in the teeth of the Court's pressure to abandon their causes. This he refused to do.

The Court of Appeals for the Federal Circuit has taken the unacceptable position in this case that an appeal is frivolous and that an attorney may be sanctioned for prosecuting it if it presents an issue identical or similar to one presented in a case recently decided by the Court or one, like the appellant's constitutional challenges to the Board's proceedings, which the Court simply is not interested in hearing. Moreover, according to the Court, an appeal which is not frivolous even under the Federal Circuit's broad definition when filed <u>becomes</u> frivolous -- and must be withdrawn under penalty of substantial sanctions -- when, while the appeal is pending, the Court decides an issue similar or identical to one it presents. In fact, under these circumstances, the Court's decision means that an attorney may be compelled to withdraw a pending appeal, under

penalty of fine or suspension or both, and may not attempt to distinguish it. Unless the attorney can successfully distinguish his case factually or legally, such an appeal is frivolous and this notwithstanding the fact that further review in the Supreme Court is dependent upon pursuing the appeal through the appeals court.

Respected experts in the field of ethics agree that the definition of a frivolous appeal adopted by the Federal Circuit has never been the test of a frivolous lawsuit. All of the experts also agreed that an attorney is not only permitted -- but ethically obligated -- to prosecute an appeal for a client who wishes to proceed under the circumstances which existed here. Thus, this case not only presents the important question whether prosecuting such cases can be deemed conduct unbecoming a member of the bar. It

also poses the question whether, even if it can, suspension from practice is an appropriate sanction where reasonable persons, knowledgeable about the standards of the profession, disagree about the propriety of the conduct at issue, and where, as here, there is no finding of bad faith on the part of the attorney.

## POINT II

AN ATTORNEY MAY NOT BE SUBJECTED TO SERIOUS DISCIPLINARY SANCTIONS WITHOUT PROCEDURAL SAFEGUARDS INCLUDING THE RIGHT TO HAVE THE ISSUES TRIED BY AN IMPARTIAL TRIBUNAL

The en banc court's order to show cause in this case was plainly an expression of the Court's interest in vindicating the authority of the Court, and punishing Solerwitz for what the Court perceived to be serious misconduct on his part directed against the judicial branch, and, ultimately, against the public. The serious sanction imposed -- a year's suspension from practice -- was also designed both to vindicate the Court's authority and to punish Solerwitz for his "misdeeds."

Thus, this disciplinary proceeding had much in common with a criminal contempt proceeding. See Young v. United States, 107 S.Ct. 2124, 2134 (1987) ("In punishing contempt the judiciary is sanctioning conduct

that violates specific duties imposed by the Court itself, arising directly from the parties participation in judicial proceedings.") And, as such, it is as vulnerable to misuse as are the courts' contempt powers.

This Court has recognized that:

> Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process . . . .

Bloom v. Illinois, 391 U.S. 194, 202 (1968). See also Cooke v. United States, 267 U.S. 517 (1925); Sacher v. United States, 343 U.S. 1 (1952). In recognition of this and of the abuses to which the contempt power is subject, this Court has placed significant limitations on this historically based power, recognizing for example, an accused contemnor's right to a

jury trial for "serious" contempts, Bloom v. Illinois, supra; Codispoti v. Pennsylvania, 418 U.S. 506 (1974); and the accused contemnor's right to an unbiased tribunal. See, e.g., Taylor v. Hayes, 418 U.S. 488 (1974); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Offutt v. United States, 348 U.S. 11 (1954); In re Oliver, 333 U.S. 257 (1948).

As Judge Scalia recently recognized, judicial involvement in contempt proceedings (in other than a strictly adjudicatory role) necessarily raises troubling questions concerning the separation of powers. There is something intrinsically problematic in:

> permitting a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place.

Young v. United States, 107 S.Ct. 2124, 2146 (1987) (Scalia J., concurring). The majority of the Court in Young looked precisely to the procedural safeguards "carefully instituted

over time" to protect against "the most tyrannical licentiousness" which Justice Scalia perceived. Id. at 2133 & n.9. But in this case, the most basic procedural safeguards were absent. In Solerwitz's case, the Federal Circuit promulgated rules of behavior, prosecuted their violation, and adjudicated whether the violation took place. No jury or prosecutor with independent ethical obligations mediated; no appeal even lies.

Adjudication before a neutral and unbiased tribunal stands as one of the most fundamental of due process rights. As this Court has observed:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudication proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivation and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The

> neutrality requirement helps to guarantee that life, liberty and property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
>
> The requirement of neutrality has been jealously guarded by this Court.

Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) (citations omitted).

Petitioner, from the start, challenged the propriety of having the Court which perceived itself to have been wronged sit in judgment of his conduct, but the Court rejected his challenge to the procedure. The impartial arbiter designated to hear evidence, and to make findings of fact and a recommendation for action, was himself a

senior judge of the very Court whose orders were allegedly repeatedly disobeyed by Solerwitz. More important, Judge Bennett viewed himself to be bound by the Court of Appeals' prior findings of frivolousness in connection with its imposition of Rule 38 sanctions against Solerwitz, findings which were made in a non-adversary, non-contested setting. In fact, to the extent Judge Bennett attempted to exercise independent judgment by recommending that the suspension from practice be stayed and that Solerwitz be placed on probation pending a demonstration of rehabilitation, his judgment was "overruled" by the en banc court which, without having heard any evidence or argument on the question, ordered that the suspension not be suspended. This was a particularly egregious trampling of rudimentary procedural safeguards since Solerwitz never even had an opportunity

to address the en banc court on the propriety or impropriety of any sanction more severe than the one recommended by Judge Bennett. Under the procedures set down by the Court, Solerwitz had an opportunity only to bring "exceptions" to Judge Bennett's determination to the en banc court. The en banc court avoided confronting the procedural irregularity by taking the absurd position that Solerwitz could not complain because a one year suspension is a less severe sanction than a suspended two year suspension from practice. This bizarre reasoning underscores the fact that the Court was much too personally involved in the dispute to be able to exercise unbiased judgment.

Petitioner was deprived of his fundamental right to an adjudication by a tribunal free of any conflict of interest. Cf. Ward v. Village of Monroeville, 409 U.S.

57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). In this case, the United States Court of Appeals for the Federal Circuit was not a conflict-free tribunal, but the party most directly and intimately involved as the "victim" of the conduct at issue.

Moreover, because the Court involved is a federal court of appeals, the statutes provide no appeal as of right. Unless ths Court grants certiorari, that Court's judgment will be final. Cf. Marshall v. Jerrico, Inc., supra, 446 U.S. at 247 & n.9.

This Court should therefore grant the writ of certiorari to review the judgment of the Court of Appeals and to set guidelines for appropriate procedural safeguards in disciplinary procedures undertaken by federal Courts of Appeals pursuant to Fed. R. App. P. 46.

## CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, NY 10007
(212) 513-7676

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Victoria B. Eiger
Of Counsel

Dated: September 15, 1988

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

Miscellaneous Docket No. 145

IN RE JACK B. SOLERWITZ

Nathan Z. Dershowitz, of Dershowitz & Eiger, P.C., New York, New York, and Alan M. Dershowitz, attorneys for Jack B. Solerwitz.

On ORDER TO SHOW CAUSE
U.S. Court of Appeals for the Federal Circuit
Washington, D.C. 20439

Senior Judge Marion T. Bennett

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

Misc. 145

In re JACK B. SOLERWITZ

---

FILED: December 10, 1987

---

BENNETT, Senior Circuit Judge.

Upon the basis of findings of fact* made pursuant to the April 8, 1987 show cause order of the court and for the reasons outlined in this opinion, it is concluded that Jack B. Solerwitz, Esq., has engaged in conduct unbecoming a member of the bar of this court in violation of Fed. R. App. P. 46(b). It is accordingly recommended that Mr. Solerwitz be

---

*Separately numbered findings set forth in explicit detail the circumstances which constitute the factual basis for the recommendation. Summary reference thereto is necessary to the following discussion.

suspended from practice before the United States Court of Appeals for the Federal Circuit for a period of 2 years. It is further recommended, for the reasons stated herein, that enforcement of the recommended suspension be held in abeyance for 2 years under conditions hereafter described.

BACKGROUND

On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) called a strike by its members who were employees of the Department of Transportation, Federal Aviation Administration. This strike against the United States was a felony violation of criminal law, 18 U.S.C. §1918(3), (4) (1982), and a violation of civil law, 5 U.S.C. §7311(3), (4) (1982). Rejecting President Reagan's direction that they return to work, over 11,000 air traffic controllers (ATCs) were summarily discharged. Over 10,000

of the discharged ATCs then appealed to the Merit Systems Protection Board (MSPB or board), contesting their discharges and seeking reinstatement. Of those receiving no relief from the MSPB, approximately 4,600 petitions for review were filed with the United States Court of Appeals for the Federal Circuit. The scope of this court's review in such cases is governed by 5 U.S.C. §7703(c) (1982).[1]

---

[1]Section 7703(c) provides that:

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence;....

Upon being suddenly confronted with the addition of thousands of appeals to its already considerable caseload, the court was faced with a need to manage the flood of litigation in such a way as to preserve the rights of all litigants to individual justice and at the same time not let the appeals of the discharged ATCs become an impossible docket bottleneck affecting all areas of the court's jurisdiction. Thus, many of the individual petitions to this court was consolidated, as had been done before the MSPB. The consolidation of cases is authorized in the law for use by the MSPB, 5 U.S.C. §7701(f); 5 C.F.R. §1201.36 (1987), and by the federal appellate courts, Fed. R. App. P. 3(b), where such action will expedite processing of cases and not adversely affect the interests of the parties. Additionally, 12 cases were selected which presented legal

issues common to most, if not all, of the appeals of the ATCs. These "lead cases" were put on a fast track and all other pending ATC cases were suspended by order of February 24, 1983. Counsel in all lead and suspended cases were so notified.[2]

On May 18, 1984, the 12 lead cases were decided.[3] Counsel for the parties in each of

---

[2]The selection of "test" or "lead" cases involving similar facts and issues has often been employed by courts and agency boards when permitted and demanded by the circumstances. See, e.g., In re American Federation of Government Employees, AFL-CIO, 790 F.2d 116, 119 (D.C. Cir.) (describing use of lead cases by the Federal Labor Relations Authority), aff'd, 107 S.Ct. 43 (1986); Clincher v. United States, 499 F.2d 1250, 1253 (Ct. Cl. 1974) ("The test case ... has been the traditional method of litigating rights of Government employees in this court.").

[3] Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

Campbell v. Department of Transportation, FAA, (footnote continued)

the suspended cases were sent copies of the court's opinions in the decided cases on the same day that the opinions issued. They were directed to notify the court within 30 days after final disposition of the lead cases as

---

(footnote continued from previous page)
735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984);

Martel v. Department of Transportation, FAA, 735 F.2d 504 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed. Cir. 1984);

Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

Novotny v. Department of Transportation, FAA, 735 F.2d 521 (Fed. Cir. 1984);

Moylan v. Department of Transportation, FAA, 735 F.2d 524 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

DiMasso v. Department of Transportation, FAA, 735 F.2d 526 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

Letenyei v. Department of Transportation, FAA, 735 F.2d 528 (Fed. Cir. 1984);

(footnote continued)

to whether they wished to proceed with their suspended cases. They were also cautioned about the impropriety of maintaining frivolous appeals and were given citations to a sampling of Federal Circuit cases where the court had imposed sanctions for the filing of frivolous appeals.

In conformity with the court's notice of May 18, 1984, counsel and petitioners were notified on December 10, 1984, that the Supreme Court had denied certiorari in all cases where Supreme Court review had been sought and that the final mandates had issued from this court to the MSPB. Counsel in the suspended cases were given 30 days thereafter within which to file renewed petitions

---

(footnote continued from previous page)
Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984);

Brown v. Department of Transportation, FAA, 735 F.2d 543 (Fed. Cir. 1984).

advising the court of those remaining issues which were relied upon and which had not been decided in any of the lead cases. This notice also repeated the cautions of the earlier notice. Finally, the court informed counsel that the order of suspension would terminate on January 10, 1985.

On three other occasions, July 12, July 31 and August 30, 1985, the court again requested air controller counsel to review the propriety of maintaining their pending appeals in light of the need to avoid abuse of the judicial process resulting from maintaining frivolous appeals. On the latter date, counsel were furnished copies of additional opinions of the court in air controller cases which had been published since July 12, 1985.

ATC Cases of Mr. Solerwitz

Jack B. Solerwitz, Esq., the senior partner in the law firm of Solerwitz, Solerwitz & Leeds, of Mineola, New York, initially represented between 800 and 1,000 air traffic controllers. The firm's attorneys represented these clients at numerous hearings before the MSPB at various locations throughout the country. Following the proceedings at the board level, Mr. Solerwitz was counsel for 736 discharged ATCs who appealed to this court. As a result of the consolidation of appeals, he filed a total of 154 petitions for review on their behalf in the Federal Circuit. Mr. Solerwitz was sole counsel for the petitioner in one of the 12 lead cases. He did not then protest use of this procedure. During the period February 24, 1983 and January 10, 1985, when all non-lead case appeals were stayed, Mr. Solerwitz continued to prepare appeals to the court. In

all of the ATC cases in which he or his firm served as counsel, new or renewed petitions or review were timely filed following the lifting of the stay.

A. Briefing

The court's notice of December 10, 1984, further ordered that briefs be filed within 60 days of the filing of renewed petitions. Mrs. Solerwitz, who as a member of the law firm had considerable responsibility to help in the preparation of the appeals, described the 60-day requirement as a "nightmare." She was also highly critical of the 50-page limitation for the briefs which had been determined in accordance with the binding rules for federal appellate courts, Fed. R. App. P. 28, and local court rule, Fed. Cir. R. 13. A motion was filed by the firm seeking permission to exceed the page limits set forth in the rules. The motion was denied, but the court, sua

sponte, granted additional time within which to file corrected briefs. At the same time, in light of the particular circumstances of these cases, the court also suggested incorporation by reference to arguments in Solerwitz briefs which had been accepted, noting that the overlong briefs proferred contained repetitious arguments of great lengths. The court's suggestion was thereafter partially accommodated by Mr. Solerwitz.

Following the briefing, oral argument was requested by Mr. Solerwitz on each of his pending appeals. Counsel insists that he was never notified of a ruling on the motion for oral argument but the court's records show that the requests for oral argument in each case were denied. The court thereafter twice notified Mr. Solerwitz that if oral argument in his pending cases was desired, he should

advise the court how his argument would distinguish the lead cases; otherwise his cases would be submitted on the briefs without oral argument. Mr. Solerwitz did not attempt to raise any such distinctions and the cases were submitted.

B. Appendices

Mr. Solerwitz also encountered difficulty in the preparation and timely filing of proper appendices as required by court rules. See Fed. R. App. P. 30; Fed. Cir. R. 12. Accordingly, a motion was filed with the court on March 18, 1985, for leave to omit appendices or, in the alternative, to delay their submission until after the government's briefs were filed. The motion pointed to the redundancy of the materials, the complexity due to the large number of petitions combined in joint briefs, the personnel shortages at the law firm, and the government's possession

of needed documentation. The motion was denied on April 2, 1985. Thereafter, a motion was made to extend the time for filing appendices in 85 cases. On June 14, 1985, the court granted this motion for a period beyond the time requested.

On August 19, 1985, a third motion was filed by Mr. Solerwitz requesting the court to enlarge further the time for filing 38 appendices and to accept late filing. The burden of compliance with the court's rules and instructions was described as requiring more time for "a federal law practice employing three people." The government filed an opposition to the motion, which was denied on August 28, 1985. Mr. Solerwitz again contends that the court either did not notify him of rulings on the motions relating to appendices or delayed unreasonably in doing so. However, the court's public records show

that the motions were ruled on in timely manner and that counsel was notified of the rulings. See Des Vignes v. Department of Transportation, 791 F.2d 142, 146 n.4. (Fed. Cir.), cert. denied, 107 S.Ct. 185 (1986).

C. Sanctions Imposed in Individual Appeals

The court generally found the vast majority of the ATC appeals filed by Mr. Solerwitz to be frivolous, an abuse of the judicial process, or exhibiting other attorney misconduct meriting sanctions under Fed. R. App. P. 38.[4] Mr. Solerwitz's general course of conduct was summarized by this court in Des Vignes. Under the facts of that specific case, the court affirmed the decision of the MSPB upholding petitioner's removal and found the appeal to be frivolous. The court outlined in exacting detail why that specific

[4]Rule 38 provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

appeal raised no unresolved issues and presented no fact pattern distinguishable from those in one or more of the lead cases published 2 yeas earlier. 791 F.2d at 143. Then, as a result of the filing and maintaining of that appeal, the court-imposed a fine of $1,000 on Mr. Solerwitz personally for a "flagrant and totally inexcusable abuse of the judicial process." Id. at 146.

In addition, to is discussion of Mr. Solerwitz's conduct in Des Vignes, that opinion observed that Mr. Solerwitz was counsel of record in an additional 130 appeals involving hundreds of ATCs still pending before that panel of the court. Of those other 130 appeals, the court concluded that 107 of the Solerwitz briefs in those pending cases were virtually identical even to the extent of repeating typographical errors, and that the other 23 appeals could be grouped

into two categories exhibiting nearly identical briefs. Id. at 145-46 & n.3. Despite the lack of citations to the record or appendices, it was necessary for the court to check the records and to read every brief in order to insure against the possibility that a valid appeal might be buried amid the "patently frivolous constitutional arguments, rejected contentions, and unsupported assertions of fact" previously advanced to and rejected by the court. Id. at 146. In the court's considered view, counsel's conduct was vexatious and unprofessional, and wasted judicial resources to the detriment of deserving litigants.

The court issued individual opinions in each of the appeals described in Des Vignes as well as in each of the other ATC appeals handled by Mr. Solerwitz. The court generally found Mr. Solerwitz's conduct in nearly all of

the ATC appeals to be deficient for various reasons and imposed sanctions on him totaling $78,300.[5] Additionally, costs and attorney fees of $11,843.94 against Mr. Solerwitz were awarded in favor of the government in the same appeals. See 28 U.S.C. §§1913, 1927 (1982); Fed. R. App. P. 38. Neither the sanctions nor their amounts were contested by Mr. Solerwitz at the time of their imposition and they are not at issue in the present proceeding. In fact, the sums charged have been paid.

---

[5]As noted in the findings, sanctions were imposed for misconduct including or consisting of (1) filing petitions that were clearly frivolous, (2) abuse of the judicial process, (3) filing briefs that were devoid of any showing on which the decisions appealed from could be reversed, (4) filing briefs devoid of any basis upon which the earlier decisions of this court could be distinguished in law or fact, (5) violation of the court's rules, particularly Rules 12 and 13(a), (6) ignoring in his reply brief contrary authority cited by the government, (7) advancing arguments regarding issues not on appeal, (8) failure to support his assertions with anything from the record, and (9) raising contentions not raised before the presiding official or the board.

Finally, it is also noted that Mr. Solerwitz has been sanctioned for prosecuting frivolous appeals by his court in cases not involving removals of discharged ATCs. See, e.g., Moir v. Department of the Treasury, 754 F.2d 341, 343 (Fed. Cir. 1985).

The Order To Show Cause

On January 21, 1987, the court entered an in banc order directing Mr. Solerwitz to show cause why he should not be suspended for 2 years from representing clients before the Court of Appeals for the Federal Circuit. The order recounted that he had filed virtually identical briefs and maintained 142 frivolous appeals (145 by later count), disregarded the court's rules and notices, failed to file appendices properly, provided no citations to the record, ignored authorities cited by the government, advanced arguments not made to the MSPB and thus not properly on appeal, failed

to distinguish the lead case precedents, and abused the judicial process further by delaying availability of the court's limited resources to deserving litigants and wasting the time of the court. He was charged under Fed. R. App. P. 46(b) with conduct "unbecoming a member of the bar of the court."[6]

---

[6]Rule 46, entitled "Attorneys," because effective July 1, 1968, with the approval of the Supreme Court and Congress. Subsection (b) reads as follows:

(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

Following the court's granting of a 30-day enlargement of time for a response to the order to show cause, on March 23, 1987, Mr. Solerwitz, through his counsel, moved to disqualify each judge of the court from ruling on the order. Additionally, he sought a stay of the proceedings, or alternatively, a further enlargement of time and alternative relief. The motion included affidavits by Mr. Solerwitz and one of his counsel. Mr. Solerwitz requested that, should his motion be denied, his affidavit be considered as his answer to the order to show cause. However,, he also requested oral argument and an evidentiary hearing. The court denied the motion as to the disqualification of he court's judges and as to the requested stay and additional enlargement of time but the request for a hearing and oral argument was granted. It was further ordered, however,

that evidence attacking the procedures of the Federal Aviation Agency, the MSPB, or the court would not be received and was irrelevant. According to the order, the sole issues were to be whether Mr. Solerwitz committed the acts charged and, if so, whether he should be suspended from practicing before the Federal Circuit for a period of 2 years.

The Evidentiary Hearing

The requested evidentiary hearing was held on July 20, 1987. The court was not represented by counsel and the hearing was non-adversary. Mr. Solerwitz did not testify. Mrs. Solerwitz, a member of his firm, testified on his behalf, as did three former ATCs, all of whom had retained Mr. Solerwitz as counsel during their appeals before the board and this court. Each of the appeals to this court by the three witnesses who were former ATCs had been held to be frivolous and

damages were imposed by the court in each case. Additionally, three witnesses, who were offered as experts on professional conduct and legal ethics, testified. No evidence offered was excluded.

The four fact witnesses called, Mrs. Solerwitz and the three former ATCs, all testified that Mr. Solerwitz had been employed because it was believed and agreed that he would pursue the ATC appeals with vigor, and that other counsel would have been employed had he not agreed to do so. Furthermore, it was uniformly asserted that it was the desire of his ATC clients to file and to continue to maintain their appeals through to a decision on the merits, both to preserve the right to seek certiorari to the Supreme Court and to keep the case "alive" in hopes of Congress

enacting legislation which would provide an alternative, political solution to their desired judicial remedy.

Evidence was presented that the standard attorney fee arrangement between Mr. Solerwitz and each of his ATC clients was for payment of $750 for legal services covering administrative procedures in the regional MSPB offices leading to an initial decision. An additional non-refundable fee of $2,500 was charged to cover all subsequent appeals, whether to the full board, to this court, or through to the Supreme Court.[7] An offer of

---

[7]Thus, had the full fees been collected for each of the 736 appeals to this court, Mr. Solerwitz would have received $2,392,000.00. However, two of the three ATC witnesses testified that their attorney fees had been waived in whole or in part because of their financial circumstances. Mrs. Solerwitz testified that fees were waived for other clients as well and there was some evidence that some of the Solerwitz clients provided services to the firm in lieu of payment of fees. The affidavit of Mr. Solerwitz stated that acceptance of the air controller cases (footnote continued)

proof was made that, if called, 14 other ATC clients of Mr. Solerwitz who had been listed as potential witnesses would have testified to the same effect. The testimony of each of the witnesses, especially those offered as experts on professional conduct and legal ethics, will be discussed in greater detail as required in the course of the following opinion.

Following the close of the evidentiary hearing, Mr. Solerwitz and his counsel were allowed to file requested findings of fact and conclusions of law along with any supporting argument counsel might wish to advance. Counsel was instructed to include all issues and objections that might later be advanced to the full court, and counsel agreed to do so. On September 10, 1987, the proposed findings

---

(footnote continued from previous page)
was a "financial disaster" for his firm, but no evidence was offered to indicate how many of the appealing air traffic controllers were not charged, did not pay, or provided services in lieu of payment.

of fact and conclusions of law were filed. However, the submitted conclusions of law were proposed solely on the testimony of the expert witnesses without citation to authority.

OPINION

The court's order to show cause cited subsection (b) of Fed. R. App. P. 46 (Rule 46) as the basis for determining whether Mr. Solerwitz's conduct had been "unbecoming a member of the bar of the court." The hearing and associated proceedings in this matter were designed to be in accordance with Rule 46 and any subsequent action recommended or taken by this court as a result of the proceedings is a matter of discipline concerning Mr. Solerwitz as an attorney and member of the bar of this federal court.[8] Nearly all of the prior

---

[8]In contrast to the disciplinary measures imposed against an attorney under the authority of Rule 46, federal appellate courts have imposed sanctions on parties and/or counsel under 28 U.S.C. §1912, which gives an (footnote continued)

monetary sanctions were imposed by this court against Mr. Solerwitz individually as counsel under the authority of Fed. R. App. P. 38 and none of his clients were required to make

---

(footnote continued from previous page) appellate court discretion to allow a prevailing party "just damages for his delay, and single or double cost"; under 28 U.S.C. §1927, which makes an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously" personally responsible for "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct"; under Fed. R. App. P. 38, which provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee"; under local court rules; or as an exercise of their inherent authority. See generally Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845, 857-863. Additionally, appellate courts have imposed sanctions for a frivolous appeal in reliance on Fed. R. Civ. P. 11. See In re Kelly, 808 F.2d 549, 551 (7th Cir. 1986); United States v. Carley, 783 F.2d 341 (2d Cir.), cert. denied, 106 S.Ct. 2251 (1986). While our discussion of Rule 46 in this opinion cites and relies on the extensive body of caselaw construing the related statutes and rules listed above, it is recognized that sanctions imposed under them are distinct from discipline imposed under Rule 46.

additional payments to Mr. Solerwitz because of the sanctions imposed against him in the individual appeals in ATC cases.

At the outset, it is noted that this proceeding marks the first time that this court has found it necessary to weigh the possibility of disciplining an attorney for conduct unbecoming a member of its bar under Rule 46. As it is a case of first impression in this court and one of only occasional occurrence in other courts, the court has proceeded cautiously, mindful of the seriousness of the proceeding. While some of the regional circuit courts of appeals have formally adopted disciplinary rules, the Federal Circuit has not. However, as recently noted by the Supreme Court:

> Courts have long recognized an inherent authority to suspend or disbar lawyers. Ex parte Garland, 4 Wall. 333, 378-379 (1867); Ex parte Burr, 9 Wheat. 529, 531 (1824). This inherent power derives from the lawyer's role as an officer of the

> court which granted admission. Theard v. United States, 354 U.S. 278, 281 (1957). The standard for disciplining attorneys practicing before the courts of appeals is set forth in Federal Rules of Appellate Procedure 46[.] (Footnote omitted.)

In re Snyder, 472 U.S. 634, 643 (1985); see also Roadway Express, Inc. v. Pipe, 447 U.S. 752, 764-67 (1980).

In Snyder, the Eighth Circuit Court of Appeals had suspended an attorney for 6 months because of his refusal to continue to perform legal services in indigent cases under the Criminal Justice Act, 18 U.S.C. §3006A, and his disrespectful refusal to comply with the Act's guidelines relating to the submission of expenses and fees. However, as outlined in the Eighth Circuit's denial for rehearing en banc and in the Supreme Court's discussion of the facts, the real dispute centered around the manner in which Mr. Snyder objected to the court's administration of the Criminal Justice

Act and his subsequent failure to recant or apologize for his "harsh" statements to the court. On those facts, the Supreme Court unanimously reversed the Eighth Circuit's suspension of Mr. Snyder, holding that a single instance of unlawyer-like rudeness did not support a finding that the lawyer was "not presently fit to practice law in the federal courts" nor did it warrant suspension from practice as "conduct unbecoming a member of the bar." 472 U.S. at 647.

The facts of the present proceeding involve the continued filing and maintenance of multiple frivolous appeals rather than a single instance of disrespectful and rude communication to the court by a member of the court's bar. However, the Supreme Court's discussion in Snyder of Rule 46 provides an excellent starting point for the analysis in the present proceeding.

> The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. In re Bithoney, 486 F.2d 319, 324 (CA1 1973). Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice.
>
> . . . .
>
> Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct. (Footnote omitted.)

472 U.S. at 644-45.

The Supreme Court further observed that while a state's code of professional responsibility does not expressly apply to sanctions in the federal courts, federal courts exercise their inherent power to admit, suspend, or disbar their attorneys and the

standards imposed by the federal courts are a matter of federal law. Id. at 645 n.6 (citing Hertz v. United States, 18 F.2d 52, 54-55 (8th Cir. 1927)). Thus, Rule 46 anticipates a member of the bar of a federal court will comply with an applicable state code of conduct and a federal court of appeals is entitled to rely on an attorney's knowledge of and duty to conform thereto. Id. While a member of the bars of several federal course, Mr. Solerwitz has been admitted to only one state bar, New York.

Unlike the regional circuit courts, this court has nationwide jurisdiction. Furthermore, the actions at issue in the present proceeding grew out of matters initiated not in a district court, but in proceedings before the MSPB, a federal administrative tribunal which allows attorneys of the bar of any state to appear before it.

Thus, in light of our nationwide jurisdiction, we prefer to look for guidance both to the American Bar Association's (ABA) Model Rules of Professional Conduct (1987) and Mode Code of Professional Responsibility (1980) as well as to other sources governing professional conduct to ascertain the applicable "lore of the profession" relevant to our authority to discipline under Rule 46 as a matter of federal law.

The Model Code of Professional Responsibility (hereinafter Model Code), although replaced by the ABA in 1983 with the Model Rules of Professional Conduct (hereinafter Model Rules), still provides the basis for the attorney ethics rules in many state codes. According to the Model Code's preliminary statement, its numbered Canons, Ethical Considerations, and Disciplinary Rules correspondingly represent the axiomatic norms,

the objectives, and the mandatory rules by which attorneys should pattern their professional conduct. The considerations and rules accompanying Canon 7, entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," were selectively cited and relied upon by Mr. Solerwitz's witnesses. EC 7-1 echoes Canon 7 by verifying that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." As EC 7-19 points out, "[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

The duty to represent the client both "zealously" and "within the bounds of the law" is further described by EC 7-4:

> The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

In the same tenor, EC 7-5 instructs that it is entirely permissible for an attorney to continue to represent a client who has rejected the attorney's advise "so long as [the attorney] does not thereby knowingly assist the client . . . to take a frivolous legal position."

The Disciplinary Rules of the Model Code were designed to be mandatory in character and to state the minimum level of conduct necessary to avoid disciplinary action. See DR 1-102(A)(1) ("A lawyer shall not violate a Disciplinary Rule"). DR 7-101 provides, in part, with respect to the zealous representation of a client:

> (A) A lawyer shall not intentionally:
>
> > (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B) ...
>
> (B) In his representation of a client, a lawyer may:
>
> > (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

In contrast, DR 7-102 provides, with respect to representing a client within the bounds of the law:

(A) In his representation of a client, a lawyer shall not:

. . . .

> (2) Knowingly advanced a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Additionally, DR 1-102(A)(5) states that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice."

Despite the ABA's replacement of the entire Model Code with the Model Rules of Professional Conduct in 1983, the Model Rules were not discussed or specifically cited by Mr. Solerwitz's expert witnesses. Generally, with respect to the Model Code sections noted above, the Model Rules harmonize with the provisions of the Model Code. For instance,

Model Rule 3.1 incorporates the provisions of both DR 7-102(A)(1) and (2) in the Model Code by providing that:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

In a significant distinction from the Model Code, however, Rule 3.1 no longer requires the lawyer to "know" that the appeal or claim is frivolous, but provides for that determination to be made using an objective standard.

Similarly, both Model Code DR 7-106(B)(1) and Model Rule 3.3 require counsel to recognize the existence of pertinent legal authorities by prohibiting the failure to disclose to a court legal authority directly adverse to a client's position which is not disclosed by opposing counsel. ABA Model Rule 8.4(a) is similar to DR 1-102(A)(1) of the

Model Code, although it adds an additional prohibition against attempting to violate the Rules. As in Model Code DR 1-102(A)(5), Model Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.[9]

As noted above, the facts before the Supreme Court in Snyder differ significantly from those in the present proceeding. In contrast to Snyder, the basis for the disciplinary proceeding in In re Bithoney, 486 F.2d 319 (1st Cir. 1973), is much closer to

---

[9]The ABA/BNA Lawyer's Manual on Professional Conduct (1987) (hereinafter ABA/BNA Manual) observes that courts that have attempted to define the scope of the prohibitions against conduct that is prejudicial to the administration of justice have usually concluded that conduct interfering with "litigation processes generally is prejudicial to the administration of justice." Id. at 101:501. Lawyer's actions which violate or misuse procedural rules or which fail to comply with a court's orders have been punished as conduct prejudicial to the administration of justice, as have frivolous appeals. Id. at 101:502 (and cases cited).

the present situation. Bithoney arose from a course of conduct in which respondent Bithoney filed nine petitions for review in immigration cases which were frivolous, or not diligently pursued, or both. Under the applicable law, the filing of the appeals by Mr. Bithoney effected an automatic and immediate stay of deportation to the benefit of his clients, regardless of the total lack of merit in the appeals. Six of the petitions had been filed after the First Circuit had issued a specific warning to counsel that any future filings which were clearly frivolous or not diligently pursued would be considered as a deliberate abuse of the judicial process designed solely to stay enforcement of the immigration orders and would be referred to the U.S. Attorney for possible disciplinary proceedings. 486 F.2d at 321 (citing warning given in Panagopoulos v. Immigration and Naturalization Service, 434

F.2d 602, 603-04 (1st Cir. 1970)). The First Circuit held that the total lack of merit and lack of diligence in pursuing the claims, especially in the face of a specific warning by the court, constituted behavior unbecoming a member of the bar under Rule 46 and, under the authority of that rule, the court suspended the respondent as a member of the bar of the court for 4 months and fined him $500.

In Bithoney, Rule 46 was held not to be so vague as to deny due process when used as a basis for attorney discipline. The court noted that the term "conduct unbecoming a member of the bar" must not be evaluated in the abstract, but must be placed in the context of being a part of a rule directed to the discrete professional group (attorneys) with a complex code of behavior that has been developed over a consideration length of time.

486 F.2d at 324. Referring to the Model Code as an illustration of the "lore of the profession," the court further stressed that there is "at least a core area of clearly prohibited conduct" which the respondent was obligated to avoid as conduct unbecoming a member of the bar.[10] Id. The court found that respondent ran afoul of both the general proscriptions of Rule 46 and of the court's specific warnings against further abuse of the judicial process and held that the vagueness of which he complained was not present. Id.; see also United States v. Hearst, 638 F.2d 1190, 1197 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981).

---

[10]As noted, the Supreme Court in Snyder cited and adopted the First Circuit's interpretation of the prohibition in Rule 46 against "conduct unbecoming a member of the bar" as viewed in light of "case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." 472 U.S. at 645 (footnote omitted).

Just as the respondent in Bithoney had been warned by the First Circuit against filing frivolous appeals, Mr. Solerwitz received several notices from this court warning against abuse of the judicial process through the filing of frivolous appeals. As a member of state and federal bars, Mr. Solerwitz is charged with knowledge of both the various professional codes and, specifically, with Federal Rules of Appellate Procedure 38 and 46. Additionally, he was sanctioned on numerous separate occasions, which should have been more than adequate to place him on notice that his overall conduct was being viewed by this court as inappropriate professional conduct and a likely subject for discipline. Therefore, Mr. Solerwitz cannot properly complain of having

to guess as to the course of conduct which could have led to further sanctions or discipline against him.

Rule 46 provides that a member of the bar of the court "shall be afforded an opportunity to show good cause . . . why the member should not be suspended or disbarred" and that the member is entitled to a hearing, if requested. Mr. Solerwitz requested a hearing, and at the hearing counsel for Mr. Solerwitz reserved all procedural objections. At the close thereof, counsel was instructed to present all such objections when proposed findings of fact and conclusions of law were submitted. Although counsel agreed to do so, no such objections were presented.

This court has not adopted the Model Federal Rules of Disciplinary Enforcement (1985), which contemplate appointment of counsel by the court to investigate and try a

disciplinary case before a judge or judges of the court.[11] As noted in the background section, the court denied a motion to disqualify each judge of the court from ruling on the order to show cause. The suggestion that a disciplinary proceeding designed to regulate the members of a court's bar cannot be conducted before the judges of that court is incredulous. While Rule 46 provides no explicit guidance as to the format of the allowed hearing, the procedures here generally parallel those used in similar proceedings.[12]

---

[11] The Model Federal Rules of Disciplinary Enforcement provide for payment to the appointed counsel. This court has not appropriate funds to implement those rules if adopted nor has it levied an assessment on the members of its bar for that purpose.

[12] See, e.g., In re Kelly, 808 F.2d 549 (7th Cir. 1986) (order to show cause by 3-judge appellate panel, attorney represented by counsel, no representative on behalf of the court); Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985) (en banc) (appeal from district court's imposition of sanction, law professor appointed as amicus curiae to

(footnote continued)

Here, as a nonadversary hearing was held before a senior judge of the court who had not participated in any of the cases in which Rule 38 sanctions were imposed against Mr. Solerwitz and who had over 23 years of experience as a trial judge prior to sitting on the appellate bench. Even without the

---

(footnote continued from previous page) represent position adverse to appellants, heard before full court); In re Snyder, 734 F.2d 334 (8th Cir. 1984) (order to show cause issued from appellate court, hearing held before 3-judge panel of court including the chief judge, court represented by counsel, and additional opinion filed by court en banc upholding chief judge's appearance on panel), reversed on merits, 472 U.S. 634 (1985); Bithoney, 486 F.2d 319 (original proceeding upon petition of U.S. Attorney, heard before 3-judge panel of court and included oral argument, sworn testimony, and briefs); In re Tatum, 587 F.2d 682 (5th Cir. 1979) (hearing before district judge acting as master, 3-judge appellate panel issued order to show cause, attorney filed written response, and panel issued order of suspension); In re Chandler, 450 F.2d 813 (9th Cir. 1971) (order to show cause issued by appellate court, heard before retried district court judge acting as master, attorney acted as amicus curiae for the court, suspension order by 3-judge panel of appellate court upon master's recommendation).

benefit of responding to formal objections, for the reasons stated above, it is concluded that the current application of Rule 46 and the hearing held in this proceeding are not violative of due process.

The respondent in Bithoney had urged, in reliance on Canon EC 7-1 of the Model Code of Professional Responsibility, that a lawyer must represent the interests of his client "zealously." He further argued that a court's finding that a position advanced was frivolous must not be a cause for attorney discipline so as not to "inhibit the bar from the most vigorous advocacy of clients' positions" or to "restrict meaningful access to the court." 486 F.2d at 322. The contrary view, it was argued, would place an attorney in an intolerable dilemma when the needs or instructions of his client would force advancement of an argument which the attorney

personally felt lacked merit and might lead to punitive action against the attorney by the court. Id.

Mr. Solerwitz, through the testimony of his expert witnesses, makes almost identical arguments in the present proceeding. In their testimony here, the experts extolled the beauties of "creative lawyering" and praised the landmark decisions vindicating important rights that have resulted from imaginative lawyers and judges not afraid to adopt positions previously rejected. Citing Model Code EC 7-1 and DR 7-101(A)(1), the experts affirmed a lawyer's duty to represent the client "zealously" using all "reasonably available means permitted by law" and also affirmed the duty of a lawyer to advance good faith arguments for an extension, modification, or reversal of legal precedents. The experts also testified that when deciding

whether to pursue an appeal a lawyer must always give the client the benefit of the doubt on the law and the facts. They further testified, in light of the constitutional right to petition government for the redress of grievances and the need for every citizen to have "his day in court," that a court must also indulge in a strong presumption in favor of the attorney's judgment in deciding to advance his appeals or arguments.

In their view, sanctioning a lawyer for advancing frivolous appeals or even requiring him to appear and respond to an order to show cause would seriously chill the creative and zealous advocacy necessary to our legal system. The experts further urged that the duty of zealous representation of the client must be held superior to the attorney's other obligations to the court or society. In their opinion, a court faced with increasing or

large caseloads has the responsibility to obtain the necessary resources to decide the cases expeditiously, and the efficient management of the court's docket is properly of no concern to an appellate attorney. In fact, they further suggested that this court may have been more interested in clearing its calendar than in providing "individualized justice" and "due process" to Mr. Solerwitz's clients. They interpreted this court's instructions to counsel as directions to "withdraw" appeals and as contrary to counsel's ethical obligations which, if followed, might potentially result in professional malpractice charges. Thus, it was their position that an attorney may ignore court instructions when the lawyer has a good faith belief that his actions are not a sham. As Mr. Harvey A. Silverglate, one of the expert witnesses, testified, it is sometimes

the duty of a lawyer "to brave . . . even a judge's view that what the lawyer is doing is frivolous." Finally, based on those briefs that they had examined, the experts did not consider the briefs to reach to level of frivolity.

Certain of the positions and contentions of Mr. Solerwitz's experts, as general propositions and when viewed in the abstract, are well anchored in the lore of the legal profession and are not challenged here. Certain of their views, however, are based on factual premises that have been overcome by the findings and are therefore inapplicable or contrary to the facts of the present proceeding. Still others either have already been addressed or are deserving of little comment. Nevertheless, each of the positions or contentions of the expert witnesses has been carefully considered.

The views of the expert witnesses, while based in part on established tenets of the legal profession, do not fully outline the duties of a lawyer nor do they provide a complete picture of the specific issues before the court in this proceeding. An attorney's obligations to provide zealous advocacy on behalf of his client are not absolute and uncompromising, but must be viewed in light of his additional obligations as an officer of the court to promote the administration of justice and to comply with the court's rules, notices, and orders. Additionally, as with his obligations to his client, the attorney's obligations to the court are ongoing at every stage of the litigation and the attorney must continually reevaluate the positions advanced

in light of both the development of the litigation itself and of the relevant case law affecting the litigation.[13]

There will always be an ongoing and at times great tension between a lawyer's duty to represent a client in as zealous a manner as possible and a lawyer's duty as an officer of the court also to avoid professional conduct that is prejudicial to the administration of justice. See Hamer v. County of Lake, 819 F.2d 1362, 1366 (7th Cir. 1987) (noting that a

---

[13] See Hamer v. County of Lake, 819 F.2d 1362, 1367-68 (7th Cir. 1987) (noting defendants can recover attorney's fees under 42 U.S.C. §1988 where the claim is frivolous or when "the plaintiff continued to litigate after it clearly became so" (citation omitted)); Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) ("When a lawyer learns that an asserted position, even if originally supported by adequate inquiry, is no longer justifiable he must not persist in its prosecution."); Asberry v. United States Postal Service, 692 F.2d 1378, 1382, 215 USPQ 921, 921 (Fed. Cir. 1982) (court's warning against frivolous appeals applicable to pending appeals).

perfect balance between avoiding a "chilling effect" on plaintiffs and deterring the filing of frivolous claims is difficult to achieve given the inherent tension between and the importance of the two concerns). Such competing concerns were considered and weighed by the court in Bithoney:

> Sensitivity to these considerations requires that we indulge every presumption in favor of the attorney who presents or defends a position which is found to lack support. We must insure that there is breathing room for the fullest possible exercise of the advocacy function. But there must be limits. Canon EC 7-1 states that the duty of a lawyer is to represent his client zealously, but only "within the bounds of the law." The processes of this court are made available for the general good; to the extent that they are abused they become less available to those genuinely in need of them. Such abuse also lowers public esteem for the judicial system . . . .

486 F.2d at 322 (emphasis added) (footnote omitted). See also Acevedo v. Immigration & Naturalization Service, 538 F.2d 918, 920-21

(2d Cir. 1976) (professional obligation of attorney to represent client zealously does not justify assertion of frivolous positions).

Here, Mr. Solerwitz asserts that a good faith effort was made to comply with the court's notices to avoid submission of frivolous appeals and to do so by distinguishing the facts and law in the appealed cases from those in the lead cases previously decided. Mr. Solerwitz's affidavit and the testimony of one of his experts focus on two specific briefs submitted to the court and attempt to demonstrate that in those cases he adequately complied with the court's notices and rules as well as made good faith arguments supported by the record in the specific case. Taken in isolation, in perhaps a few of the briefs, the issue might appear colorable. However, each individual brief has already been evaluated by a panel of this

court which decided the merits of the individual case or cases covered by the specific brief and, in most cases, found the briefs to be so deficient as to merit the imposition of sanctions or to support the award of costs and fees. As stated earlier, the determinations regarding sanctions in the individual cases are not at the core of the inquiry here. Rather, the central focus here is whether the entire course of conduct by Mr. Solerwitz, taken as a whole, amounts to conduct unbecoming a member of the bar of this court which warrants further discipline in addition to the sanctions previously imposed. Cf. Toepfer v. Department of Transportation, FAA, 792 F.2d 1102 (Fed. Cir. 1986) (distinguishing between damages and costs assessed under Rule 38 and a disciplinary action against an attorney under Rule 46).

The court in Bithoney made clear that the propriety of sanctions or other discipline under Rule 46 was an issue necessarily to be resolved on the facts and circumstances of the specific situation before the reviewing court. The court there concluded that --

> respondent has abused the processes of this court by lodging appeals of patent frivolity . . . Whether we question his good faith is not determinative; his course of action was so clearly and flagrantly in violation of the proper behavior of a member of the bar of this court that it represents at a minimum such gross negligence that punitive action is indicated.

486 F.2d at 322-23. The above applies with equal force to Mr. Solerwitz's course of conduct which led to the present proceeding. Since shortly after its formation, this court has made it clear that an attorney's subjective good faith will not by itself prevent the imposition of sanctions against the attorney for bringing and maintaining a

frivolous appeal.[14] See, e.g., Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1553-55, 220 USPQ 193, 202-04 (Fed. Cir. 1983); Asberry v. United States Postal Service, 692 F.2d 1378, 1382, 215 USPQ 921, 921 (Fed. Cir. 1982). Therefore, whether his beliefs were truly in good faith at the time of the individual appeals need not be reviewed here, as it is clear that under an objective standard, Mr. Solerwitz fell woefully short of achieving the goal that his representation of his clients was allegedly designed to achieve. See Bithoney, 486 F.2d at 322.[15]

---

[14]In an analogous situation, sanctions imposed by district courts under the recent amendment to Fed. R. Civ. P. 11 do not require subjective bad faith by an attorney to be proved prior to the court's imposition of sanctions. See, e.g., Robinson v. National Cash Register Co., 808 F.2d 1119, 1127 (5th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 107 S.Ct. 1371 (1987); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

[15]Mr. Solerwitz's subjective beliefs that he
(footnote continued)

Mr. Solerwitz attempts to distinguish the situation in Bithoney from the present case by drawing a distinction between a sham appeal and a frivolous appeal. According to Professor Monroe H. Freedman, one of the experts called by Mr. Solerwitz, a sham appeal is one which is facially valid but the lawyer presenting it knows that it cannot be supported on the record. Professor William E. Hellerstein, another expert witness, also distinguished as unacceptable the sham argument which could not be legitimately based on the case record. Under Professor Freedman's view, Bithoney represented a sham proceeding which was so devoid of factual

---

(footnote continued from previous page) was zealous on behalf of his clients and that he was doing his duty to prosecute their appeals in accordance with their insistent wishes, if held in good faith, are only relevant to the exercise of the court's discretion in setting the type and severity of the sanction or discipline otherwise found to be warranted.

basis that the attorney could not even file briefs or make any arguments, despite the seemingly plausible claims. On the other hand, he defines a frivolous appeal as one which is fallacious on its face. Professor Freedman further concludes that if a lawyer is instructed by his client to proceed and the lawyer believes that the appeal does not represent a sham, it is not only not frivolous, but ethically mandated that the lawyer proceed with the appeal.[16] In his

---

[16]Professor Freedman illustrates his views through an example in which he asserts that an attorney should, if the client and the appeal so demand, present arguments to a court asserting that the earth is flat, even if the attorney believes it to be otherwise. The rationale for this position is that the court might nevertheless be convinced that the earth is flat or, on further appeal, a higher court might be so convinced. However, courts have made clear that there is a limit to the number of times that identical arguments on identical issues can be presented before such arguments are properly deemed frivolous. See, e.g., Sauers v. Commissioner of Internal Revenue, 771 F.2d 64, 68 n.6 (3d Cir. 1985) (citing cases holding repeatedly rejected arguments in

(footnote continued)

opinion, the ATC appeals handled by Mr. Solerwitz could not therefore be considered to be either frivolous appeals or akin to the sham appeals held sanctionable in Bithoney.

It has been observed elsewhere that appellate courts often succumb to impatience and frustration when confronted with an obviously frivolous appeal and fail to develop a comprehensive definition of frivolous appeals to guide litigants, attorneys, or themselves in future cases. Martineau & Davidson, Frivolous Appeals in the Federal Courts: The Essays of the Circuits, 34 Am. U.L. Rev. 603, 628-29 (1985). Sitting for the Sixth Circuit by designation, Chief Judge Markey observed that "[f]rivolity, like obscenity, is often difficult to define."

---

(footnote continued from previous page)
taxpayer suits as frivolous), cert. denied, 106 S.Ct. 2286 (1986); Brown v. United States, 741 F.2d 1374, 1377 (Fed. Cir. 1984) ("flagrantly redundant" arguments and appeals badly abuse the judicial process).

WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1088, 220 USPQ 17, 20-21 (6th Cir. 1983). In Connell, writing for this court, he subsequently observed that:

> The definition of what constitutes a frivolous civil appeal is difficult. Courts must guard against an oversensitivity to what may be only an apparent abuse. It is clear that appeals having a small chance of success are not for that reason alone frivolous. One may legitimately argue, for example, that even overwhelming contrary precedent should be overruled or distinguished.

722 F.2d at 1554, 220 USPQ at 203. See also Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421-22 (1978) (warning against use of post-hoc reasoning and hindsight logic to conclude that, because plaintiff did not ultimately prevail, the action was unreasonable or without foundation).

Despite the recognized difficulty of providing a single, all-encompassing definition of frivolity, the decisions of this court and the regional circuit courts have provided basic definitions of frivolous appeals. In Connell we clearly stated that a frivolous appeal was one with "no basis for reversal in law or fact [which] can be or is even arguably shown." 722 F.2d at 1554, 220 USPQ at 203; see also Bowen v. Department of Transportation, FAA, 769 F.2d 753, 755-56 (Fed. Cir. 1985) (briefs ignored precedent and failed to cite authority for assertions); Klein v. Department of Transportation, FAA, 768 F.2d 336, 338 (Fed. Cir. 1985) (failure to cite significant precedent and use of rehashed and rejected arguments). Several circuits generally defined a frivolous appeal as one in which the result is obvious, or where the appellant's claim completely lacks merit, or

which is prosecuted for delay, harassment, or other improper purpose. See, e.g., Reliance Insurance Co. v. Sweeney Corporation, Maryland, 792 F.2d 1137, 1138 (D.C. Cir. 1986); Dallo v. Immigration & Naturalization Service, 765 F.2d 581, 589 (6th Cir. 1985); Scott v. Younger, 739 F.2d 1464, 1467 (9th Cir. 1984); Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 74 (1st Cir.), cert. denied, 469 U.S. 1018 (1984); see also Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (frivolous "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands," and to do so is inimicable to the purposes for which the federal court system was created).

Among other factors[17] a court must examine and evaluate in order to determine whether an appeal is frivolous are the merits of the claim or the appeal, the factual foundation, the scope and strength of the legal precedent, the presentation of the arguments and their support, the reasonableness of the interpretation of the law offered, whether contrary precedent is cited and distinguished, the conduct and good faith of the appellant and counsel, issues decided or presented in prior litigation by the party or counsel, the effect of and compliance with any relevant court rules or orders, and the harm caused by the misconduct. Nevertheless, whether an appeal is ultimately frivolous must necessarily be decided on a

---

[17]For discussions of these and additional factors which have been found to contribute to findings of frivolity by federal courts, see generally Martineau & Davidson, supra, and ABA/BNA Lawyer's Manual on Professional Conduct 61:101-09 (1987).

case-by-case basis as it is only through the evaluation of the specific circumstances before the court that it can be determined if the appeal at issue "falls clearly on the side of the frivolous." See Devices for Medicine, Inc. v. Boehl, 822 F.2d 1062, 1068, 3 USPQ2d 1288, 1294 (Fed. Cir. 1987).[18]

What is certain is that our precedent as well as that of the other circuit courts does not limit the determination of frivolous appeals solely to the "fallacious on its face" appeal or to the "sham" argument. Additionally, in contrast to the "sham" situation characterized by Bithoney, it may have been possible to prepare nonfrivolous appeals in some or even many of the cases

---

[18]Mr. Silverglate testified that his office utilizes a "giggle test" when preparing appeals for criminal defendants. Under the test, if no one in the office giggled when a defense does not find frivolous appeals to be a laughing matter, such a test would be clearly inappropriate for our use.

filed by Mr. Solerwitz on behalf of his ATC clients. But it is not sufficient to show that nonfrivolous arguments were theoretically possible. A court must evaluate the merits of an appeal, and the frivolity of its claims and arguments, on the basis of what is presented to the court for consideration, not on what counsel might have or should have submitted.

As was observed by this court upon examining Mr. Solerwitz's submitted briefs in Des Vignes, "[e]very issue counsel raises is either itself frivolous or is foreclosed by decisions that no reasonable attorney could expect to be overturned, modified, or withdrawn on the present record." 791 F.2d at 143. Furthermore, his briefs were found to exhibit general and striking failures to cite or distinguish contrary authority, to distinguish the facts of the appeal from prior cases, to respond to contrary arguments of the

respondent, or to even refer to the record. These conclusions are confirmed by an independent review of the Solerwitz briefs conducted as part of this proceeding which indicates, by clear and convincing evidence, that his attempts to comply with the court's notices, rules, and instructions were dramatically deficient in each of the respects notices in the order to show cause. All of these failures are even more striking when viewed in the face of numerous notices of the court cautioning against such behavior by counsel. See In re Hartford Textile Corporation, 659 F.2d 299, 303-05 (2d Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

Thus, the simple fact remains, as born out by the opinions of this court in each individual appeal, that the briefs filed by Mr. Solerwitz fell short of meeting an objective standard of nonfrivolity. Indeed,

it is curious that the attorney who decries an alleged "lack of individualized justice" for his clients submitted nearly identical briefs (with the same typographical errors) comprised of oft-rejected arguments on behalf of each of those clients. When identical arguments are submitted, a brief which might not be clearly frivolous when first viewed can become so when viewed in light of a contrary decision on the identical argument in a previously decided appeal. Cf. A.V. Costantini v. Civil Aeronautics Board, 706 F.2d 1025, 1026 (9th Cir. 1983). This is especially true where there is no attempt to identify or distinguish the contrary decisions or their facts. When this pattern of behavior is multiplied many times over, in the face of warnings from the court, it is inescapable that Mr. Solerwitz's submissions to the court, viewed as a

collective whole, were no inadequate that they must be deemed to have fallen to the level of conduct unbecoming a member of the bar.

Once again, it is emphasized that it is not the motives and actions of each of Mr. Solerwitz's clients, but the behavior and overall course of conduct of Mr. Solerwitz, a licensed attorney and member of the bar of this court, in advancing and handling the appeals of his clients to this court that concerns us here. Mr. Solerwitz's witnesses attempt to characterize his actions as merely the zealous efforts of counsel to ensure to his clients the constitutional right of every citizen under the First Amendment to petition the Government for redress of grievances. It is well established that "the right to petition extends to all departments of the Government [and] access to the courts is indeed but one aspect of the right to

petition, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), but it is equally established that the right to petition is not without limits. Cf. McDonald v. Smith, 472 U.S. 479 (1985).

As the Supreme Court specifically observed in Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731, 743 (1983), one of the cases cited by the expert witnesses for the right to petition, suits based on "insubstantial claims" which lack a "reasonable basis" are not within the scope of First Amendment protection.[19]

> "The first amendment interests involved in private litigation-compensation for violated rights and

[19]The other case cited by Mr. Solerwitz's expert witnesses for the right of access to the courts in order to petition government was NAACP v. Button, 371 U.S. 415 (1963). In Button, the Court confirmed that "the First Amendment . . . protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." Id. at 429. As frivolous lawsuits do not have the character of lawful ends, the case is also not determinative in the present proceeding.

> interests, the psychological benefits of vindication, public airing of disputed facts -- are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition."
>
> . . . [B]aseless litigation is not immunized by the First Amendment right to petition.

Id. (citations and footnote omitted); see also Rager v. Commissioner of Internal Revenue, 775 F.2d 1081, 1083 (9th Cir. 1985) (rejecting challenge to penalty imposed for frivolous, meritless petition, observing that right to petition does not include right to maintain groundless litigation). Thus, we find no fault with the Bithoney court's observation that the sanctioning of an attorney for filing multiple frivolous appeals does not infringe upon or chill First Amendment rights. 486 F.2d 324 n.9.

It is undisputed that Mr. Solerwitz's clients were not prevented from petitioning the government for review of their claims and that they received a decision on the merits of those claims from the MSPB. This court's decisions in each of the appeals were also "on the merits," despite sanctions being imposed on counsel in most of the cases for bringing "meritless" appeals. The Ninth Circuit has expressly rejected, as frivolous itself, the assertion that "the petitions clause of the First Amendment guarantees the right of any citizen to present any petition to any Governmental Agency, however frivolous, without penalty . . . even if there is no basis for the action taken by a litigant." In re Itel Securities Litigation, 791 F.2d 672, 676 (9th Cir. 1986) (quotations omitted), cert. denied, 107 S.Ct. 880 (1987). Furthermore, a petition which was not

frivolous when initially brought and litigated may indeed properly be deemed frivolous upon the filing of an appeal over the same issue. See, e.g., Clark v. Maurer, 824 F.2d 565, 566-67 (7th Cir. 1987); International Union of Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1406 (9th Cir. 1985). Thus, to the extent that Mr. Solerwitz is urging a constitutional right to pursue any appeal, no matter how frivolous, his position is emphatically rejected.

The right to petition for redress of grievances and the right to appeal an adverse decision on the initial petition are not identical. The right of appeal was not recognized at common law and there remains no federal constitutional right to an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983).[20]

---

[20]In Jones, the Supreme Court held that the appointed defense counsel had no constitutional duty to raise every
(footnote continued)

Mr. Solerwitz nevertheless urges that his clients' access to the courts must be foreclosed by the courts themselves and that the courthouse door could not be closed by the attorney. In his view, he had a compelled obligation to pursue his clients' appeals and was without discretion to withdraw those appeals on the basis of his own judgment, despite the court's "suggestions" to the contrary in its orders. However, the court's "suggestions" to avoid the filing of frivolous appeals were only instructions to avoid

---

(footnote continued from previous page) nonfrivolous issue or to present every nonfrivolous argument requested by the defendant if, as a matter of professional judgment, the counsel decided not to present those points. The Court observed that "a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." 463 U.S. at 745. Civil appeals also require equal exercise of professional judgment by the responsible attorney as to the proper arguments and issues to be advanced, especially where the judgment to be exercised concerns the frivolity of the argument or issue to be raised.

frivolity, and were not either instructions or suggestions to withdraw appeals in which nonfrivolous arguments could be made. In fact, it is either Mr. Solerwitz's absolute failure to exercise his professional judgment in evaluating the merits of the appeals or his gross negligence as an attorney in properly advancing his appeals in a nonfrivolous manner that has led to his being charged with conduct unbecoming a member of the bar of this court.

Any general presumption in favor of Mr. Solerwitz's judgment on whether or not an individual appeal was frivolous is overwhelmed under the present facts by his consistent and striking inability to evaluate the presence of arguable merits in over 140 separate appeals.[21] If, as appeared to be the case

---

[21]It is not a defense to the bringing of the appeals by Mr. Solerwitz that, had he not brought them, the appeals would simply have been brought by other counsel or by the appellants appearing pro se. Had the same
(footnote continued)

from the submissions, the appeals in the present cases indeed represented the extreme situation where every conceivable argument was frivolous, Mr. Solerwitz could not have been faulted ethically for not bringing the appeals. See Model Rules 3.1 ("[a] lawyer shall not bring or defend a proceeding, or

---

(footnote continued from previous page) appeals been brought by another counsel, this proceeding might still be taking place, albeit under a different caption. Had each individual appellant brought an appeal pro se, the appropriateness of sanctions in the individual cases would have been evaluated in light of those circumstances. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaints held to less stringent standard than those drafted by lawyers); Wright v. United States, 728 F.2d 1459, 1460 (Fed. Cir.) (noting courts demonstrate remarkable patience with pro se litigants, but sanctioning pro se appellant for abuse of judicial process), cert. denied, 469 U.S. 844 (1984); WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088, 220 USPQ 17, 20 (6th Cir. 1983) (Markey, C.J., by designation) (although pro se litigants can be sanctioned, they cannot be held to the same standards as members of the bar); Ruderer v. United States, 412 F.2d 1285, 1292 (Ct. Cl. 1969) (court is lenient in evaluating papers of a pro se litigant), cert. denied, 398 U.S. 914 (1970).

assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous"); Model Code DR 2-110(C)(1)(a) (a lawyer may withdraw from matter if his client "[i]nsists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law"); see also Taylor v. Sentry Life Insurance Co., 729 F.2d 652, 656 (9th Cir. 1984) ("lawyers have a duty to inform a client that his claim is unjustified").

Mr. Solerwitz also cannot find refuge in the unwaivering insistence of his clients to pursue the appeal "no matter what" and to "go all the way to the Supreme Court." In McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981), the Ninth Circuit rejected an attorney's reliance on a client's insistence as a justification for bringing a frivolous

appeal against certain individuals and sanctioned the attorney for filing the appeal. In doing so, the court held that "[p]ursuit of a meritless claim is not justified by the client's desire to do so" and that "[the attorney's] conduct was not compelled by his obligations to his client." Id. at 119 (citing Model Code DR 2-109(A)(2), DR 7-102(A)(2), EC 7-5 (1979)); see also Blair v. Shenandoah Women's Center, Inc., 757 F.2d 1435, 1438 (4th Cir. 1985). "[W]hile 'a party or counsel is not to be penalized for maintaining an aggressive litigation posture,' 'attorneys do not serve the interests of their clients, of the profession, or of society when they assert claims or defenses grounded on nothing but tactical or strategic expediency." Westmoreland v. CBS, Inc., 770 F.2d 1168, 1180 (D.C. Cir. 1985) (citations omitted). In Bithoney, the court held that the frivolous

appeals abused the judicial process because they had been filed in order to effect an automatic stay of deportation of the petitioners. 486 F.2d at 322. Similiarly, the testimony here indicates that Mr. Solerwitz exploited this court's resources in an attempt to keep his clients' otherwise frivolous claims alive pending a speculative legislative or political solution to the aftermath of the ATC strike. Regardless of whether his filings were at the behest of his clients, such action is also an improper use of this court for other than the adjudication of claims.

It is acknowledged here that judicial views and concepts, with the lapse of time as well as changes in society and in the membership on the courts, have indeed changed on many issues and will likely continue to do so. Zealous and enthusiastic advocacy by

counsel plays a critical role in this process. See Eastway Construction, 762 F.2d at 254. While an attorney is not foreclosed from arguing in the face of even overwhelming precedent, in order to avoid frivolity it is imperative that the attorney cite and attempt to distinguish the contrary precedent and provide arguable reasons supporting an extension, modification, or reversal of existing law. Mr. Solerwitz consistently did neither. Furthermore, if the arguments necessarily advanced in an appeal require counsel either to urge reconsideration of contrary precedent by the appellate court or to advance an argument solely to preserve the possibility of Supreme Court review of the issue, counsel should alert the appellate court as to that motivation at the time the case is brought rather than as a post-hoc

rationalization.[22] See Hayes v. Department of Health and Human Services, 829 F.2d 1092, 1101 (Fed. Cir. 1987) (sanctions not warranted where petitioners expressly noted that rejected argument raised solely to preserve right to seek in banc consideration and possible Supreme Court review). Where the contrary precedent within the same court is fresh or where the Supreme Court has already passed on the issue, the burden on counsel to avoid frivolity through distinguishing the

---

[22]Mr. Solerwitz stresses that the Supreme Court did not affirm any of this court's decisions in the lead cases because a denial of a petition for certiorari is not a decision on the merits by the Supreme Court. Thus, he argues here that the desire to preserve the possibility of Supreme Court review was one justification for his continued presentation of rejected arguments. No mention of this motivation was made in any of his briefs and we note that only four petitions for certiorari were filed from his 154 appeals on behalf of 736 petitioners. All four petitions were denied.

contrary precedent or advancing a grounds for alteration of the contrary precedent is accordingly heightened.

Finally, the claim that the chaos that apparently characterized the Solerwitz law office during the period in question was solely due to the court's inaction and excessive delay in responding to his motions is rejected. Mr. Solerwitz's attempt to characterize his submissions as the reasonable results of valiant efforts by his 3-attorney law firm to comply with arbitrary court orders and deadlines, and in the face of additional court inaction, is both inaccurate and unsympathetic. As outlined in the findings, the court responded in a timely manner to each of the motions filed by Mr. Solerwitz. At best, his assertions to the contrary indicate a failure to maintain adequate office procedures and recordkeeping which does not

excuse or mitigate his conduct. It is the responsibility of every practicing attorney to manage his practice both to represent his clients effectively and to comply with the rules and orders of the court. See, e.g., United States v. Bush, 797 F.2d 536, 537-38 (7th Cir. 1986); In re Pritzker, 762 F.2d 532, 533 (7th Cir. 1985).

It is difficult to fathom how a 3-person practice, even in ideal circumstances, could adequately represent 800 to 1,000 clients in administrative hearings across the country and handle 154 court appeals for 736 individuals, given the relatively short time frame in which all of the actions arose. If the firm's personnel turnover and shortages were so severe as not to allow compliance with the briefing and record filing requirements of the court, Mr. Solerwitz should have referred some of his clients to other firms or taken

alternative means to insure adequate representation for them. See Pritzker, 762 F.2d at 533 (proper course is to move to withdraw, not ignore court orders and seek indulgence in disciplinary proceeding); Bithoney, 486 F.2d at 323 & n.3 (illness not an excuse and merely informing clients of difficulty is not sufficient if attorney unable to fulfill obligations to court and client); McMorris v. State Bar, 29 Cal.3d 96, 623 P.2d 781, 171 Cal. Rptr. 829 (1981) (taking on too much work is not mitigating factor since condition is within the attorney's control). Rather than sympathy, we find Mr. Solerwitz's attempted justifications for his conduct provoke a greater confidence that discipline is warranted in this case.

On the basis of the findings, this opinion, and cited authority, it is therefore concluded that clear and convincing evidence

supports the determination that Mr. Jack B. Solerwitz's continued course of conduct in filing and maintaining multiple frivolous appeals in the face of this court's orders, notices, instructions, rules, precedents, and previous sanctions constitutes conduct unbecoming a member of the bar of the United States Court of Appeals for the Federal Circuit. It is further concluded that none of his offered justifications or defenses excuse that conduct. Therefore, it is concluded that Mr. Solerwitz has not rebutted the order to show cause. The final task is to select the appropriate disciplinary action to be ordered by the Court.

## DISCIPLINARY ACTION

The imposition of sanctions serves three primary goals: compensation of the opposing party for the time and expense involved in defending meritless claims, punishment of the

offending party or counsel for wasting the limited time and resources of the court, and deterrence of future frivolous filings in order to reduce the court's delay in reaching the appeals of other litigants. Martineau, supra, 1984 Duke L.J. at 847-48.[23] The filing of a frivolous lawsuit or appeal is a

---

[23]See also R. Rodes, K. Ripple & C. Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 73-74 (Federal Judicial Center 1981), where it was stated:

> The primary justification for imposing penalties on the lawyer is that he "is first of all an officer of the court. His primary obligation is to the court. When there is a conflict between the interest of the client and his duty as an attorney, the latter must control." The courts have inherent power to supervise and discipline the efficient running of the court system. By controlling an attorney's conduct, the court fulfills the duty it owes to its own preservation, to members of the general public, and to those members of the profession who do cooperate and are in sympathy with the proper administration of the law. (Footnote and citation omitted.)

violation of an attorney's duty, as an officer of the court, to abide by the rules and procedures which define the administration of justice. Courts today increasingly recognize that frivolous claims and appeals pollute the judicial process. The corresponding increase in courts resorting to the imposition of sanctions as provided in the federal rules is one attempt at cleansing this environment. But the federal rules providing for sanctions are no panacea for attorney misconduct or for the insubstantial and meritless claims that clog and abuse the judicial process. See Zaldivar, 780 F.2d at 829-30.

Ordinarily, the filing of a frivolous appeal in this court has been and will probably continue to be handled in accordance with the provisions of Fed. R. App. R. 38, and therefore, in most cases, a frivolous filing by itself should not result in attorney

discipline under Rule 46. Mr. Solerwitz was sanctioned under Rule 38 and he has paid to the government the damages, costs, and attorney fees imposed by the court. However, the imposed sanctions clearly had no effect in altering his conduct of continuing abuse of the judicial process, interferece with the administration of justice, and waste of limited judicial resources. The separate and distinct provisions of Rule 46 insure that a federal appellate court is not constrained to watch a member of its bar pay sanctions imposed under Rule 38 yet continue unabated the same course of conduct which resulted in the sanctions in the first place, without having recourse to further disciplinary proceedings.

The preamble to the ABA Model Rules of Professional Conduct provides, in the part pertinent to discipline:

> The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomlete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Thus, the selection of the appropriate sanction for a given instance or pattern of attorney misconduct is a matter within the considered discretion of the court.

The Standards for Imposing Lawyer Sanctions (ABA Joint Committee on Professional Sanctions, 1986) (hereinafter Standards) were approved by the ABA House of Delegates in February 1986 and constitute the official policy of the ABA. They provide a range of

possible sanctions for lawyer misconduct from disbarment or suspension to admonition or remprimand. See generally Standards 2.2--2.10. However, in light of the court's reliance on Rule 46(b) as the basis for its order to show cause, only the sanction of suspension will be considered to have been placed in issue here. With respect to suspension, Standard 2.3 provides:

> Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation and fitness to practice law.

However, it is also noted that the court's order further limited the maximum term of any possible suspension to a period of 2 years.

Standard 3.0 states that "[i]n imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Standard 6.2 addresses appropriate sanctions "in [abuse of the legal process] cases involving failure to . . . bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal." With respect to suspension in such cases, it is provided that "[s]uspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and . . . causes interference or potential interference with a legal proceeding." Standard 6.22.

Here, the duty violated was toward the legal system through abuse of the legal process by frivolous filings and disregard of court rules and orders, and the injury to the legal system caused by having to address 145 such appeals is clearly actual and significant. It is certain that Mr. Solerwitz was consciously aware of the court's rules and orders regarding overlong briefs, the filing of appendices, citations to the record, and the need to cite and distinguish the lead cases. Nevertheless, as previously noted, testimony was presented that Mr. Solerwitz believed that he was providing the zealous representation that his clients demanded and that he was making a good faith effort to comply adequately with the court's rules and orders. On the other hand, it is possible to infer bad faith merely from the conduct of the attorney or the evidence in the record, the

briefs, or the arguments. See Martineau, 1984 Duke L.J. at 854-55 & n.61 (and cases cited). Furthemore, it is also clear that Mr. Solerwitz knew that his attempts at compliance, even if in good faith, did not in fact comply in many regards with the court's orders and rules. With respect to the court's instructions to avoid frivolity, it has already been concluded here that Mr. Solerwitz's course of conduct represnted, at a minimum, gross negligence with respect to the preparation and presentation of the appeals.

Standard 8.2 provides that "[s]uspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to . . . the legal system." Additionally, a pattern of misconduct and multiple offenses is considered to be an

aggravating circumstance under Standard 9.2. With respect to the presence of other aggravating or mitigating factors listed in Standards 9.2 and 9.3, it is noted that Mr. Solerwitz responded to the order to show cause and generally cooperated in this proceeding. The court also has not been made aware of any prior disciplinary proceedngs or sanctions imposed against Mr. Solerwitz for similar or unrelated misconduct elsewhere. While Mr. Solerwitz exhibits no remorse for his conduct, it is realized that a broad acknowledgement of the wrongful nature of his conduct would have been inconsistent with vigorous presentation in the hearing, which attempted to demonstrate that his conduct was not unbecoming a member of the bar of this court.

On the basis of the foregoing guidelines, and taking all of the findings into consideration, it is accordingly recommended

that Mr. Jack B. Solerwitz be suspended from the bar of the United States Court of Appeals for the Federal Circuit for a period of 2 years from the date of an order of the court so directing. In making this recommendation, the substantial sanctions already imposed under Rule 38 in favor of the government have been considered in mitigation. The court has also considered that each of Mr. Solerwitz's expert witnesses were of the opinion that his conduct did not amount to conduct unbecoming a member of the bar. To a certain extent, their opinions were based on facts found not to exist in Mr. Solerwitz's situation. To the extent that their opinions are founded on the presumed right to appeal any action, regardless of merit, their view is unacceptable.

In Asberry v. United States Postal Service, 692 F.2d 1378, 1382, 215 USPQ 921, 921 (Fed. Cir. 1982), despite finding the appeal to be frivolous, this court remitted the costs and attorney's fees imposed under Rule 38 in light of the possibility that appellants and counsel appearing before the court did not fully realize the applicability or the scope of the Federal Rules of Appellate Procedure in our proceedings. It is difficult to believe at this late date that application of the Federal Rules could come as a surprise to anyone practicing before the court. However, the expert witnesses also offered the opinion Mr. Solerwitz was not on notice that his course of conduct could possibly subject him to additional discipline beyond the monetary sanctions already imposed. Although this court has previously observed the distinction between Rule 46 and Rule 38, see

Toepfer, 792 F.2d at 1102-03, that case was not decided until after the majority of Mr. Solerwitz's appeals.

This is the first time that this court has found it necessary to invoke Fed. R. App. R. 46(b) and therefore is also the first time that sanctions have been imposed under Rule 38 and Rule 46 for conduct arising from the same set of appeals. Therefore, in accordance with the Asberry rationale, it is further recommended that enforcement of the suspension of Mr. Solerwitz be held in abeyance for 2 years, pending his demonstration of rehabilitation during probation.

If, during the 2-year suspension period, this court concludes that Mr. Solerwitz has further ignored orders of the court, violated its rules or instructions, filed further frivolous appeals, or otherwise abuses the judicial process, the stay of the enforcement

of the suspension may, in its discretion, be revoked by order of the court. At that time, the suspension may be reinstated and enforced on the basis of this opinion and the findings, without additional proceedings. Furthermore, the lifting of the stay of suspension shall not preclude the imposition of additional sanctions related to new misconduct or incompetent performance.

The discussion in this opinion and imposition of the recommended action will serve to show the court's bar some types of conduct the court considers "unbecoming" within the context of Rule 46. It will aos forewarn all members of the court's bar that in the future the court will not feel constrained to hold its sanctions or discipline in abeyance, and may, in the

exercise of its considered discretion, invoke the provisions of either Rule 38 or Rule 46, or both, as the circumstances warrant.

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

**Misc. 145**

In re JACK B. SOLERWITZ

\- - - - - - - -

FINDINGS OF FACT

1. Jack B. Solerwitz, Esq., 170 Old Country Road, Mineola, New York 11501, is a member of the bar of the United States Court of Appeals for the Federal Circuit. He has certified that he is also admitted to practice before the Supreme Court of the United States; the Supreme Court of the State of New York, Appellate Division, Second Department; the United States Courts of Appeals for the Second and District of Columbia Circuits; the United States District Courts for the Southern and Eastern Districts of the State of New York and for the District of Columbia; the United States Claims Court; the Tax Court; and the Court of Military Appeals.

2. As a partner in his law firm, Solerwitz, Solerwitz & Leeds, Mr. Solerwitz filed 154 appeals on behalf of 736 air traffic controllers (ATC) of the Federal Aviation Administration who were dismissed from their positions for participation in an illegal strike against the United States in August 1981. 18 U.S.C. §1918 (1982); 5 U.S.C. §7311 (1982). These controllers earlier lost appeals before the Merit Systems Protection Board (MSPB or board).

3. On February 24, 1983, the court ordered all ATC appeals from the MSPB stayed pending final disposition of certain "lead cases." On May 18, 1984, the court published 12 lead case opinions, see 735 F.2d 477-549 (Fed. Cir. 1984), which included and disposed of issues common to many of the approximately 4,600 remaining cases which had been suspended pending final disposition of the lead cases.

Mr. Solerwitz was the only attorney on the brief in one of the argued-lead cases, Novotny v. Department of Transportation, FAA, 735 F.2d 521 (Fed. Cir. 1984). At the time the 12 lead cases were decided, Mr. Solerwitz had 11 ATC cases pending before this court, not including Novotny. Four of his other ATC cases had previously been decided.

4. On May 18, 1984, the court sent a notice to counsel and petitioners in ATC litigation advising that they would be notified upon final disposition of all lead cases, and that within 30 days of the notification they must notify the court, in writing, if they wanted to continue to prosecute the suspended appeals. Failure to notify the court would result in dismissal. The notice to counsel and petitioners included, among other matters, copies of the court's opinions in the lead cases and

directed attention to the impropriety of maintaining frivolous appeals, citing published cases of the court on that issue.

5. On December 10, 1984, in conformity with the May 18, 1984 notice, counsel and petitioners in all ATC cases were notified that the Supreme Court had denied certiorari in all lead cases in which it had been sought and that mandates had been issued in those cases from this court to the MSPB. This notice also advised that the suspension entered on February 24, 1983, would remain in effect to and including January 10, 1985. Before the latter date, pending petitions for review were required to be withdrawn or new ones filed. Absent such action the petitions would be dismissed. A renewed petition was required to contain "a statement of the issues relied on and not decided in any of the 'Lead Cases.'" The notice also indicated where the

lead cases were published and again emphasized the impropriety of frivolous appeals, repeating the precedents cited in the May 18, 1984 notice.

6. Subsequent to receiving the notice of December 10, 1984, Mr. Solerwitz continued to prosecute his 11 original appeals pending on May 18, 1984. One of those appeals was decided on June 12, 1985, and the other 10 on August 14, 1985. Sanctions of $500, excluding costs, were levied on Mr. Solerwitz for each appeal. In addition to these appeals he also filed 138 new ATC petitions for review. On July 12, July 31, and August 30, 1985 the court by memorandum requested all ATC counsel to review the propriety of maintaining appeals in light of the need to avoid frivolity and the accompanying abuse of the judicial

process. With each of the five notices in 1984-85 the court furnished counsel with a set of published lead cases or citations thereto.

7. The court sanctioned Mr. Solerwitz in 145 of the 154 ATC appeals he filed. This court informed him of the nature of his misconduct each time he was sanctioned. Listed below are general examples of his misconduct for which money sanctions were levied and paid.

a. Solerwitz filed and maintained petitions that this court deemed were clearly frivolous. See, e.g., Amodeo v. Department of Transportation, FAA, 788 F.2d 1549, 1550-51 (Fed. Cir. 1986); Stefansky v. Department of Transportation, FAA, Appeal No. 85-1684A (August 1, 1986) (unpublished); Adsit v. Department of Transportation, FAA, Appeal No. 85-1639 (July 16,

1988) (unpublished); Boyd v. Department of Transportation, FAA, Appeal No. 85-1587 (May 28, 1986) (unpublished); Cecil v. Department of Transportation, FAA, 767 F.2d 892 (Fed. Cir. 1985).

b. Mr. Solerwitz was deemed by this court to have abused the judicial process. See, e.g., Ernst v. Department of Transportation, FAA, Appeal No. 85-1847 (September 9, 1986) (unpublished); King v. Department of Transportation, FAA, Appeal No. 85-1710 (August 1, 1986) (unpublished); Sweeney v. Department of Transportation, FAA, Appeal No. 85-1671 (July 16, 1986) (unpublished); Wickard v. Department of Transportation, FAA, Appeal No. 85-1592 (May 28, 1986) (unpublished).

c. Mr. Solerwitz was deemed by this court to have filed briefs that were devoid of any showing on which the decision appealed from could even possibly be reversed. See, e.g., McNeice v. Department of Transportation, FAA, Appeal No. 85-1669 (September 26, 1986) (unpublished); Knight v. Department of Transportation, FAA, Appeal No. 85-1684 (July 16, 1986) (unpublished); Panettieri v. Department of Transportation, FAA, Appeal No. 85-1591 (May 28, 1986) (unpublished).

d. Mr. Solerwitz was deemed by this court to have filed briefs that were devoid of any basis upon which the earlier decisions of this court could be distinguished in law or fact. See, e.g., Des Vignes v. Department of

Transportation, FAA, 791 F.2d 142, 146 (Fed. Cir.), cert. denied, 107 S.Ct. 185 (1986); Beninati v. Department of Transportation, FAA, Appeal No. 85-1991 (September 9, 1986) (unpublished); McCurry v. Department of Transportation, FAA, Appeal No. 85-1707 (August 1, 1986) (unpublished); Olivard v. Department of Transportation, FAA, Appeal No. 85-1641 (July 16, 1986) (unpublished); Amengual v. Department of Transportation, FAA, Appeal No. 85-1589 (May 28, 1986) (unpublished).

e. Mr. Solerwitz was deemed by this court to have violated this court's rules, particularly Rules 12 and 13(a), pertaining to appendices and citations to the record in briefs, respectively. See, e.g., Des Vignes v. Department of

Transportation, FAA, 791 F.2d 142, 146 (Fed. Cir.), cert. denied, 107 S.Ct. 185 (1986); Imundo v. Department of Transportation, FAA, Appeal No. 85-1735 (September 9, 1986) (unpublished); Polansky v. Department of Transportation, FAA, Appeal No. 85-1713 (August 1, 1986) (unpublished); Stephens v. Department of Transportation, FAA, Appeal No. 85-1668 (July 16, 1986) (unpublished); Allen v. Department of Transportation, FAA, Appeal No. 85-1593 (May 28, 1986) (unpublished).

f. Mr. Solerwitz was deemed by this court to have ignored, in his reply brief, many authorities cited by the government. See, e.g., Mendoza v. Department of Transportation, FAA, Appeal No. 85-1994 (September 9, 1986)

(unpublished); Sinak v. Department of Transportation, FAA, Appeal No. 85-1995 (September 9, 1986) (unpublished); Gilbertson v. Department of Transportation, FAA, Appeal No. 85-1992 (September 9, 1986) (unpublished); Medeiros v. Department of Transportation, FAA, Appeal No. 85-1993 (September 9, 1986) (unpublished); Beninati v. Department of Transportation, FAA, Appeal No. 85-1991 (September 9, 1986) (unpublished).

g. Mr. Solerwitz was deemed by this court to have advanced numerous arguments in his briefs regarding issues not on appeal. See, e.g., Smieszek v. Department of Transportation, FAA, Appeal No. 85-1996 (September 9, 1986) (unpublished); Mendoza v. Department

of Transportation, FAA, Appeal No. 85-1994 (September 9, 1986) (unpublished); Gilbertson v. Department of Transportation, FAA, Appeal No. 85-1992 (September 9, 1986) (unpublished); Wickard v. Department of Transportation, FAA, Appeal No. 85-1592 (May 28, 1986) (unpublished).

h. Mr. Solerwitz was deemed by this court to have failed to support assertions in his briefs with anything from the record. See, e.g., McNeice v. Department of Transportation, FAA, Appeal No. 85-1669 (September 26, 1986) (unpublished); Mendoza v. Department of Transportation, FAA, Appeal No. 85-1994 (September 9, 1986) (unpublished); Sejba v. Department of Transportation, FAA, Appeal No. 85-1639B (July 16, 1986) (unpublished);

Scott v. Department of Transportation, FAA, Appeal No. 85-1726 (August 1, 1986) (unpublished).

i. Mr. Solerwitz was deemed by this Court to have raised contentions in his briefs that were not raised before the presiding official or the board. See, e.g., Fong v. Department of Transportation, FAA, Appeal No. 85-1787 (September 9, 1986) (unpublished); Noriega v. Department of Transporta;tion, FAA, Appeal No. 85-1643 (July 16, 1986) (unpublished); Irwin v. Department of Transportation, FAA, Appeal No. 85-1586 (May 28, 1986) (unpublished).

8. The most inclusive documentation of Mr. Solerwitz's continued course of conduct before this court was in Des Vignes v. Department of Transportation, FAA, 791 F.2d

142 (Fed. Cir.), cert. denied, 107 S.Ct. 185 (1986). Des Vignes explicitly detailed the proceeding nine examples of misconduct. It also observed that, although Mr. Solerwitz represented hundreds of individual former air traffic controllers, except for a paragraph or two relating to the individual controllers, 107 of his briefs were virtually identical. This court supported that conclusion by noting, inter alia, the presence of the same typographical errors in each brief, and the failure of Mr. Solerwitz to distinguish between appeals involving one petitioner from those involving multiple petitioners. Des Vignes also mentioned that although the 107 briefs were identical, it was incumbent upon the court to check the record and to read every brief in an effort to insure against the possibility that a meritorious appeal might otherwise be overlooked. The court held that

the appeal raised no legal issues which were not resolved in one or more of the lead cases decided in 1984 and presented no fact pattern distinguishable from those cases.

Conduct in Rehiring Cases

9. In Wagner v. Office of Personnel Management, 783 F.2d 1042 (Fed. Cir.), cert. denied, 106 S.Ct. 3276 (1986), this court upheld OPM's determination in a class-action suit that air traffic controllers who were removed for participating in the 1981 strike against the FAA wee unsuitable for reemployment with that agency. Mr. Solerwitz did not represent Wagner. In three other appeals, however, Mr. Solerwitz represented former air traffic controllers who were removed from the FAA for striking and who sought rehiring by the FAA. Notwithstanding the decision in Wagner, Mr. Solerwitz persisted in filing the rehiring appeals.

(The Wagner decision was issued on February 18, 1986; petitioners' briefs in all three appeals prosecuted by Mr. Solerwitz were filed in August 1986.)

Two of the three appeals challenged the board's determination that the petitioners involved were members of the Wagner class and therefore bound by that decision. The board found, and this court affirmed, that petitioners were members of the Wagner class who were aware of the issues involved in that case, that petitioners did not opt-out after being given an opportunity to do so, and that the issues in Wagner were the same as those on appeal in the two cases. McKee v. Merit System Protection Board, Appeal No. 86-1399 (December 9, 1986) (unpublished); Matsumoto v. Merit Systems Protection Board, Appeal No. 86-1398 (December 8, 1986) (unpublished). The third appeal did not argue that petitioner was

not in the Wagner class; it challenged only the board's decision that petitioner was unsuitable for reemployment under Wagner. McCormick v. Office of Personnel Management, Appeal No. 86-1397 (December 4, 1986) (unpublished). In all three appeals, Mr. Solerwitz attempted to reargue the merits of the original removals by the FAA, an issue not before this Court.

Mr. Solerwitz was fined a total of $600 for the filing and maintenance of the three rehiring appeals because they were frivolous and his conduct constituted an abuse of the judicial process.

10. These findings emphasize Mr. Solerwitz's FAA cases to illustrate the basis for the action of the court which resulted in sanctions against him but they do not attempt to include all of his non-FAA cases. He has appeared as counsel in the latter type of

case. For instance, in Moir v. Department of the Treasury, 754 F.2d 341, 343 (Fed. Cir. 1985), he and his client were sanctioned jointly and severally with a $500 penalty in favor of the government for filing a frivolous appeal from a decision of the MSPB which had dismissed the appeal to it because it was untimely filed. The court was shown no abuse of discretion by the board. The delay was held not to have been caused by circumstances beyond appellant's control or excusable neglect.

The Order of the Court to Show Cause

11. On January 21, 1987, the court entered an in banc order directing Mr. Solerwitz to show cause, by written answer within 30 days, as to why he should not be suspended for 2 years from representing clients before the Federal Circuit. At the request of Mr. Solerwitz he was given an

additional 30 days to respond and he did so on the last day, March 23, 1987. The order required a response as to whether oral argument or an evidentiary hearing was desired which, if accorded by the court, was to be strictly limited to the conduct described in the order. A Declaration of Admission To Practice was also required and the content thereof is stated in finding 1.

12. The order to show cause recounted the five instances in which the attention of Mr. Solerwitz was directed by letter to the impropriety of filing frivolous appeals and required him to state how adjudication of his appeals would involve issues not decided in any of the published lead cases. It was mentioned that he also had been warned by numerous sanctions under Fed. R. App. R. 38 in his rejected appeals. The order recounted

that he had maintained 142 frivolous appeals and had filed 107 virtually identical briefs. He was charged with having --

> disregarded Federal Rules of Appellate Procedure and this court's rules, failed to file appendices, provided no citations to the record, ignored authorities cited by the government, advanced numerous arguments on issues not on appeal, and repeatedly raised contentions not raised before the Merit Systems Protection Board. Mr. Solerwitz's briefs were devoid of any showing on which the decision appealed from could even possibly be reversed, devoid of any basis on which the precedents of this court could be distinguished in law or fact, and devoid of any effort to make such distinctions, in total disregard of this court's written instructions of December 10, 1984.
>
> . . . .
>
> Mr. Solerwitz' conduct in filing and maintaining frivolous appeals having no colorable basis in fact or law has wasted the time and limited resources of this court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process. Mr. Solerwitz's conduct has been "unbecoming a member of the bar of the court." Fed. R. App. R. 46(b). See, e.g.,

In re Snyder, 105 S.Ct. 2874 (1985); In re Bithoney, 486 F.2d 319 (1st Cir. 1973).

Damages imposed as of the date of the order were stated to total $74,500. The current total is $78,300, plus costs and fees of $11,843.94 for the filing of frivolous appeals. These sums have been paid in favor of the government.

13. On March 23, 1987, Nathan Z. Dershowitz, Esq. attorney for Mr. Solerwitz, filed a Motion for Disqualification of Each of the Judges of the United States Court of Appeals for the Federal Circuit and for Alternative Relief. The motion also requested a stay pending resolution by the United States District Court for the District of Columbia of an action entitled Arakawa v. Reagan, Appeal No. 85-3488, and an enlargement of time for a response on the merits after determination of both matters should the relief sought therein

denied. The Federal Circuit was named a defendant in the Arakawa matter, but was dismissed from the case by a memorandum opinion and ordered of the district court on July 28, 1987. The motion of March 23, 1987, was supported by an 11-page affidavit of Mr. Solerwitz and a 4-page affidavit of Mr. Solerwitz.

14. The affidavit of Mr. Solerwitz requested that if the motion of March 23 was denied the court should consider his affidavit as his answer to the order to show cause. However, he also requested oral argument and an evidentiary hearing. The affidavit, in summary, recounts that he was approached by discharged former air traffic controllers who requested that he represent them and that in doing so it was "an economic disaster for my firm." He charged that his clients were denied due process by the MSPB and that the

board was biased and engaged in procedural improprieties which were identified. The affidavit charges that procedures of the court, which led to suspension of the appeals of many of his clients pending decision in the lead cases, deprived them of "individualized justice" only in order for the court to clear its calendar, and that this was a denial of due process to his clients. He denied that any of the appeals he filed were frivolous and cites his brief in Stefansky v. Department of Transportation, FAA, Appeal No. 85-1684A, as an example of his good faith and compliance with the court's orders. That case was decided, per curiam, by an unpublished opinion on August 1, 1986, affirming the MSPB decision and citing lead cases which had already disposed of the issues raised in Stefansky. A penalty of $200 was imposed on Mr. Solerwitz, in favor of the government, for filing a

frivolous appeal and abusing the judicial process. Mr. Solerwitz further claimed that the court's notices were received after his briefs were filed and, in effect, were a suggestion that his briefs should be withdrawn. He asserted that the court was acting both as prosecutor and judge and that it should withhold any further action pending the outcome of his come in Arakawa v. Reagan in the district court.

15. The affidavit of Mr. Nathan Z. Dershowitz identified himself as counsel for Mr. Solerwitz, together with his brother, Professor Alan M. Dershowitz. The affidavit recounted the large task of putting together the documentary evidence in response to the order show cause and raises the difficulty of potential constitutional issues concerning the court's use of lead cases to disposes of others not decided on the merits. According

to the affidavit the challenge of Mr. Solerwitz to this lead case procedure and his demand that some of the lead cases be reconsidered were suggested to have been entirely proper even if offensive to the court, and imposition of sanctions "may well be more harmful than the perceived transgression." In event of disqualification of the judge of the Federal Circuit, additional time was requested for an answer to the order to show cause.

16. On April 8, 1987, the court entered an in banc order ruling on the March 23, 1987 motion for Mr. Solerwitz. In summary, this order (a) denied the motion for disqualification of all judges of the court, (b) denied the motion for stay pending resolution of Arakawa v. Reagan, (c) denied the request for another enlargement of time, (d) granted the request of Mr. Solerwitz that

his affidavit be considered his answer to the order to show cause, (e) granted the request for an evidentiary hearing and oral argument, and (f) limited the evidentiary hearing an oral argument to the actions of Mr. Solerwitz described in the order to show cause, i.e., whether he committed the acts set forth therein and whether good cause was shown as to why those acts should not warrant his suspension from practice before the court for 2 years. Attacks upon the procedures of the Federal Aviation Agency, the MSPB, and the court were held to be irrelevant and not to be heard.

17. Senior Judge Marion T. Bennett, who had not sat on nor participated in any of the cases on which Mr. Solerwitz had been sanctioned by the court, was designated by the order of April 8, 1987, to conduct the hearing and to receive such oral argument as he deemed

appropriate. He was also instructed to make findings and a recommendation for action by the active judges of the court, to which Mr. Solerwitz was accorded opportunity to respond in writing within 30 days from the filing thereof. The rest of the order pertained to making a record of the proceedings and directed Mr. Solerwitz to file with the clerk within 30 days from the date of the order a list of his proposed witnesses, the subject matter of their testimony and estimated time therefor, and a list identifying all documentary evidence proposed to be offered into evidence.

18. On May 8, 1987, counsel for Mr. Solerwitz responded to the court's order of April 8, 1987, and submitted a list of three proposed expert witnesses to testify with respect to the ethical propriety of impropriety of Mr. Solerwitz's actions before

the United States Court of Appeals for the Federal Circuit; one witness to testify about facts leading up to the filing of briefs by Mr. Solerwitz; and 17 witnesses, who were clients, for testimony as to discussions had with Mr. Solerwitz about proceeding with his or her case before the court. The response further listed 389 pieces of documentary evidence proposed to be offered into evidence.

The Hearing

19. The matter of In re Jack B. Solerwitz was heard on July 20, 1987, in Washington, D.C. Four individuals were called as fact witnesses by Mr. Solerwitz's counsel: Kathleen P. Solerwitz, attorney at law, law partner and wife of Mr. Solerwitz, Mr. Allenby Aweau, Mrs. Gloria Pedersen, and Mr. Ronald May. The latter three persons are former air controller clients of Mr. Solerwitz. Counsel made an offer of proof that it the other 14 former ATC

clients identified as potential witnesses in the pretrial response were called, their testimony would correspond to that of Aweau, Pedersen and May. Only five documents were offered into evidence. All were received. Judicial notice has been taken of other relevant documents of record.

20. Three witnesses, who are attorneys at law and qualify as experts in the filed of legal ethics and professional responsibility, testified: Professor Monroe H. Freedman, Hempstead, New York; Harvey A. Silverglate, Esq., Boston, Massachusetts; and Professor William E. Hellerstein, Brooklyn, New York. Mr. Solerwitz was not called as a witness, relying instead on his affidavit appended to the March 23, 1987 motion to disqualify the judges of the Federal Circuit, and for alternative relief in connection with the order to show cause. See findings 13-16.

21. Kathleen P. Solerwitz is an attorney at law licensed to practice in New York State and the District of Columbia. She maintains offices in both locations. She is a member of the Federal Circuit bar. As a member of the law firm of Solerwitz, Solerwitz & Leeds, Mineola, New York, she was active in handling claims of air controllers represented by her firm. In summary, it was her testimony that at one time the firm represented between 800 and 1,000 controllers. Upon completion of hearings at the regional level of the MSPB, clients who received adverse decisions were advised of their appeal rights. Not all chose to appeal. Ultimately, appeals were filed on behalf of 736 controllers. Although the court's processing of appeals was suspended by the court's order of February 24, 1983, and notice of May 18, 1984, pending final disposition of the lead cases, Mrs. Solerwitz

testified that work continued in the development of the facts and legal issues necessary for ultimate use in the suspended cases. All name members of the firm worked on the ATC cases and Michael Vollbrecht, an associate at the firm, also assisted in preparing appeals. A former air controller was also employed to assist with technical questions. Close personal contact was maintained with clients by telephone and office consultations and through a newsletter describing progress on the cases and the issues to be resolved.

22. Mrs. Solerwitz testified as to the receipt of the court's notice of December 10, 1984, advising that mandates had issued in the lead cases and that counsel in suspended cases had until January 10, 1985, to advise the court whether petitions in suspended cases would be renewed with a statement of issues

relied on that were not decided by the lead cases. She said that the short time period allowed by the court put a tremendous burden on the law firm. She canceled her maternity leave and with the employment of 20 temporary technical and legal assistants new petitions were timely filed.

23. In the opinion of Mrs. Solerwitz, briefs and appendices could not reasonably be prepared and filed with the court within the 60 days from the filing of renewed petitions, as instructed in the December 10, 1984 notice. Therefore, with briefs due between March 25 and April 1, 1985, Mrs. Solerwitz testified that a motion was filed with the court on March 18, 1985, for leave to omit appendices citing Fed. R. App. P. 30(f) and Fed. Cir. R. 12(j). In the alternative, it was requested

that leave be granted to delay submission of the appendices pursuant to Fed. R. App. P. 30(c) and Fed. Cir. R. 12(b).

24. Grounds for the March 18, 1985 motion were stated to be --

> redundancy of the material to be contained therein; the complexity generated by the number of petitioners within the joint briefs; the fact that the major issues are constitutional law and statutory law, not required to be in an appendix; the circumstances that the facts regarding the individual petitioners are contained in the record; and the fact that the voluminous material which would be included is duplicative of what is in the record.

It was further represented that since some of the joint petitions contained approximately 100 petitioners, the complexity of an appendix to a brief in those situations would be virtually unintelligible and a burden to the court.

25. Mrs. Solerwitz described the requirement to file hundreds of appendices as "a nightmare" and "impossible" within such a limited time as allowed by the court. Further, she testified that the problem of compliance was complicated by the government's possession of some of the documents and by its refusal to indicate as to what it would stipulate. Also, Mr. Vollbrecht had left the firm in early March 1985, his work incomplete. She testified that no decision by the court was ever received as to the motion of March 18, 1985. Judicial notice is taken that the motion was, in fact, timely denied by an order of the Chief Judge on April 2, 1985, after consideration of opposition to the motion. Mrs. Solerwitz admitted that a letter arrived from Ms. Helen Kane, then the court's motions

staff attorney, advising that the motion as to the appendices had been denied. That letter was dated April 4, 1985.

26. As appendices were prepared, they were submitted to the clerk's office. Mrs. Solerwitz testified that on or about May 7, 1985, a motion was made for an extension of time for filing appendices, stating that again no response to the motion was received from the court. She further stated as her assumption that either the motions were granted or were still pending decision. "I didn't have any idea until we got the order to show cause that there was a question that the appendices hadn't been accepted."

27. It is noticed that the court has of record a motion filed on May 3, 1985, by Mr. Solerwitz to extend the time to May 27, 1985, for filing appendices in 85 listed cases. That motion was granted but the court extended

the filing date to June 11, 1985. Notice was mailed to Mr. Solerwitz at his address and was not returned for nondelivery.

28. In his pretrial list of proposed exhibits, counsel for Mr. Solerwitz identified as exhibit 5 a motion dated August 14, 1985, to accept petitioners' appendices for filing. That motion, signed by Mr. Solerwitz, requested an unspecified extension of time within which to file appendices. The motion argued that the task of preparation was unprecedented in scope, frustrated standardized methods of compilation, was complicated by the government's failure to cooperate, and was unduly burdensome for "[a] federal law practice employing three people thus requir[ing] extended time to accomplish the task." The motion stated further that --

> petitioners had already lost time needed to approach timely compliance while the Court considered for several weeks said motion [to omit appendices] made in good faith

pursuant to FRAP 30(f) and CAFC Rule 12(j) on the basis of the fact that appendices would largely duplicate the record on appeal.

Cf. finding 25. The motion of August 14, 1985, was denied on August 28, 1985, and notice is taken that Mr. Solerwitz was sent this information at this address on that date by a letter from the clerk. Receipt of the letter is denied but it was not returned to the clerk for nondelivery. In 51 cases Mr. Solerwitz filed no appendices in disregard of Fed. App. R. 30(a) and Fed. Cir. R. 12. See Des Vignes, 791 F.2d at 146 n.4.

29. Mrs. Solerwitz described some of the ACT cases as having multiple petitioners, one with "97 people." Contending that some of their employment situations differed from others, and that decisions in the lead cases were "fact-specific," counsel moved on March 18, 1985, to file 10 "overlong briefs" in appeals involving 116 petitioners. These

briefs exceeded the page limit allowed by the court's rules. Notice is taken that on April 4, 1985, after opposition was considered and by letter to the Solerwitz firm, the court's motions staff attorney advised that the motion had been denied and that the briefs which had been sent to the clerk would not be accepted for filing. The court, sua sponte, granted counsel 30 days from April 4, 1985, within which to file corrected briefs.

30. In its letter of April 4, 1985, the court remarked upon various deficiencies in the overlong briefs received. It stated:

> With regard to those briefs which must be resubmitted, petitioner is directed that all pages must be numbered. The court noted that each of the briefs as filed contains the same 44 page discussion of the issues and legal argument. By way of suggestion, this section could be incorporated by reference to those briefs which have been accepted for filing, and might thus reduce the length of some of the briefs which were not accepted.

> The court also noted extensive repetition in the brief as submitted in 85-1626 in that portion dealing with individual petitioners. It would appear that if such repetitious material is deleted the brief will be considerable shorter in length. [Emphasis in original.]

Through incorporation by reference, as suggested by the court, some of the briefs were accordingly, reduced in length. Motions to sever were denied.

31. Mrs. Solerwitz testified that on or about June 28, 1985 (actually July 1, 1985), a motion was made requesting oral argument in each case filed by the law firm but that the court did not decide the motion. The court's files, however, contain a copy of a letter to the firm on July 10, 1985, notifying counsel that the motion was denied on that date. On February 7 and March 3, 1986, the court inquired of Mr. Solerwitz as to whether oral argument was then desired and, if so, requested justification for it by a statement

of how oral argument would distinguish the lead cases. Again, a list of the lead cases was given to counsel. Six of seven requests for extensions of time to respond were granted. Absent receipt of the statement requested by the court, the cases of Mr. Solerwitz were submitted without the benefit of oral argument.

32. Mrs. Solerwitz testified that her firm's clients were all instructed as to the limited statutory jurisdiction of the Court of Appeals for the Federal Circuit to review facts found by triers of the facts. However, she said it was the view of the firm, and all of its clients who appealed, that it was important to get a final individual judgment in each case to preserve each client's right to apply for certiorari to the Supreme Court if relief was not otherwise granted. Further, according to Mrs. Solerwitz, some clients

expressed hope for a congressional political solution to their claims for restoration to duty if no judicial remedy was forthcoming. The Solerwitz briefs on the merits did not make the argument that it would have been unprofessional conduct not to have pursued the cases notwithstanding unfavorable precedents and the court's five notices.

33. Mr. Allenby W. K. Aweau had been an air controller for 14 years when his employment was terminated for strike participation. He was employed at the Oakland Air Traffic Control Center, Fremont, California. He employed Mr. Solerwitz as his legal counsel in February 1982. Mr. Aweau testified that the fee arrangement was for the payment of $750 for proceeding through the regional MSPB administrative hearing process and an additional unrefundable $2,500, covering all fees and costs for any post-

hearing steps, potential or actual. This was the standard Solerwitz fee arrangement for all ATC claims. Mr. Aweau made it clear to Mr. Solerwitz that his case must be appealed or other counsel would be employed. He further explained his preference that his case not be consolidated with others. Mr. Aweau was unable to pay any fees but "worked it off" by gathering data for Mr. Solerwitz relating to other ATC clients.

34. In the unanimous per curiam opinion in Aweau v. Department of Transportation, FAA, No. 85-1724 (Fed. Cir. August 1, 1986) (unpublished), the court decided 18 appeals which had been consolidated, including the case of Mr. Aweau, and held that all of the respective appeals were without merit and that each of the contentions had been made, considered, and rejected in published lead cases, which were cited by the court, or were

contentions improperly raised for the first time on appeal. The brief in Appeal No. 85-1724 was held to be substantially identical to that filed by Mr. Solerwitz in Des Vignes v. Department of Transportation, FAA, 791 F.2d 142 (Fed. Cir.), cert. denied, 107 S.Ct. 185 (1986). The adverse decision of the MSPB was affirmed in each of the 18 consolidated appeals, finding the same to be frivolous and counsel's conduct in filing to be an abuse of the judicial process. The court sanctioned Mr. Solerwitz personally with the sum of $1,800 which he paid to the United States Treasury, plus costs.

35. Gloria B. Pedersen (Theil; Wilson) was an ATC at Anchorage, Alaska. Her employment was terminated in August 1981 for illegal strike participation. She was a union representative. Mrs. Pederson testified that she employed Mr. Solerwitz as her lawyer in

March 1982 under the standard fee arrangement previously described. She paid the $750 for the regional MSPB procedures and borrowed $2,500 which she thereafter paid for an appeal. Although cautioned by counsel that an appeal might result in penalties, she testified that she insisted Mr. Solerwitz proceed with her appeal or she would get another lawyer. Her appeal was unsuccessful.

36. In Akola v. Department of Transportation, FAA, No. 85-1675 (Fed. Cir. July 16, 1986) (unpublished), the court unanimously affirmed the decision of the MSPB, sustaining the dismissal of Mrs. Pederson, one of 15 petitioners in that consolidated appeal. On the basis of previously decided similarly issues of fact and law in the published lead cases, which the court cited, the appeals of all 15 petitioners were held to be frivolous and counsel's conduct to be an abuse of the

judicial process. The consolidated brief was described as substantially similar to other briefs filed by Mr. Solerwitz. He was sanctioned $1,500 and cots which have been paid.

37. Mr. Ronald May testified as a discharged air controller and client of Mr. Solerwitz who was employed because he was expected to be aggressive in pursuing an appeal. Mr. May paid the initial standard $750 fee for the regional MSPB proceedings which resulted in an adverse decision. He insisted on an appeal but could not and did not pay the $2,500 fee which was waived because of May's financial condition. He testified that he was one of four controllers who went to prison for strike participation, having been found to be in criminal violation of the no-strike statute, 18 U.S.C. §1918. He received a sentence of 1 year and 1 day and

actually served 90 days, plus 18 months of supervised probation. Mr. May had 11 years of employment as an air controller at Fort Worth, Texas, prior to his discharge in August 1981. He had also served as a union president until shortly before the strike.

38. Professor Monroe H. Freedman was called by Mr. Solerwitz as an expert witness in matters of legal ethics. He is a professor of law and former Dean of Hofstra University Law School, Hempstead, New York. He has been a law professor for 30 years, including 16 years at George Washington University. A graduate of Harvard University School of Law, he has qualified as an expert witness on lawyers' and judges' ethics before numerous courts and in both federal and state disciplinary proceedings. Professor Freedman was the first chairman of the Legal Ethics Committee of the District of Columbia Bar and

;has been three times chairman of the Committee on Professional Responsibility of the Society of American Law Teachers, and chairman of similar committees of multiple bar associations. Over the years, he has written and published extensively on legal ethics. He testified that his book, Lawyers' Ethics in an Adversary System (1975), received the American Bar Association's Gavel Award Certificate of Merit in 1976, that it has been favorably reviewed, and that his book and articles on lawyers' professional responsibilities have been widely cited. As reporter to the Roscoe Pound Foundation, he was a principal draftsman of the American Lawyer's Code of Conduct and is reviewing editor for the Georgetown Journal of Legal Ethics. Among other subjects, he teaches legal ethics, has been a consultant to bar groups on Model Rules of Professional Conduct, has been a speaker at many bar

association meetings and law schools on lawyers' professional responsibilities, and has had experience in trial and appellate litigation. Professor Freedman is a member of the bars of New York, Massachusetts, Pennsylvania, and the District of Columbia, and is admitted to practice before several federal trial and appellate courts and the Supreme Court of the United States.

40. In Professor Freedman's opinion it is necessary, in order to determine what is "conduct unbecoming a member of the bar," to understand both the code of professional responsibility and the lore of the profession. The latter goes back many years to the English tradition which he illustrates with samples from Gilbert's Oxford Book of Legal Anecdotes (Oxford University Press). The thrust of his view is that it is a lawyer's duty to represent his client zealously before the

court, that if the lawyer is in doubt he should resolve issues in favor of the client, and beyond that the court must indulge in a presumption supporting the lawyer's judgment. He regards as frivolous only a paper that is fallacious on its face as distinguished from a sham pleading in which the argument is plausible but the lawyer knows or should know that the underlying facts are not there to support it.

41. Had Professor Freedman been consulted by Mr. Solerwitz on whether to go forward with appeals in view of the decisions in the lead cases and the court's warnings about frivolous appeals, he would have advised that if the clients wished to proceed it was Mr. Solerwitz's ethical duty as a lawyer to do so and that this would especially be so if the appeals could be distinguished from the lead cases. He did not regard this as a close

case. He knew of no authorities that would have taken a contrary position. It was his opinion that what Mr. Solerwitz did on behalf of his clients was in the tradition of the American system of individualized justice. He pointed to the First Amendment right to petition for the redress of grievances as including the right to litigate a civil case, and submitted that a bad motive on the part of a litigant is not a justification for dismissing a case.

42. It was the stated opinion of Professor Freedman that, confronted with orders such as those of the court in this case, it would be totally improper for a lawyer to withdraw his client's cases, having concluded that they were frivolous. Because a lawyer feels that he will likely lose before a given court is no reason not to pursue an appeal. "Creative lawyering" in the face of

contrary precedents has resulted, in his view, in landmark decisions and opinions which vindicated claims of important rights. By the same token, he would not regard the failure to file appendices, overlong briefs, and ignoring authorities, as conduct unbecoming a member of the bar. In his opinion, the American Bar Association Model Code of Professional Responsibility and the communications which Mr. Solerwitz received from the court would not give counsel fair warning that the appeals being maintained would constitute conduct unbecoming an officer of the court. A sanction by the court "could seriously chill zealous advocacy and creative advocacy" and impair the opportunity of judges to benefit from the imaginativeness and creativity of lawyers who appear before them.

43. In summary, Professor Freedman's opinion is that if a lawyer believes in good faith that his case is not a sham and his client instructs him to proceed, it is his duty to do so notwithstanding any instructions to the contrary from a court. This is so even if the lawyer has no faith in his argument because that does not make it a frivolous argument. Further, the mere fact that a court may have a large caseload which it wishes to move expeditiously, while a justifiable concern, "does not reach anything like the weight of the lawyer's obligation of zealous representation," and "the lawyer's obligation is to indulge every presumption factual and legal in favor of the client" even, if necessary to argue that the earth is flat. In his view, a court must "bend over backwards to defer to counsel's judgment with regard to what is filed and what is argued." The

court's duty is to decide appeals expeditiously and to obtain the necessary resources to deal with its caseload rather than to "push [punish] lawyers for making arguments the court rejects but [should] simply . . . reject the argument." He further stated that "[o]ne thing about due process of law is that nobody has ever promoted it on grounds of efficiency." Professor Freedman does not reject the lead case concept for docket control by a court except to the extent it subverts the rendering of individual justice and ignores the individual facts of each claimant's case. He knew of no judicial precedent supporting the court's proposes action as reflected by its order to show cause.

44. Professor William E. Hellerstein testified as an expert on legal ethics as applied to appellate advocacy. A graduate of

Harvard Law School in 1962, he is presently a professor of law at Brooklyn Law School. Previously he was in private practice and for 20 years was employed in the Appeals Bureau of the Legal Aid Society in New York. For 16 years he was in charge of the unit and personally argued over 200 appeals. He supervised 165 attorneys in the handling of both civil and criminal appeals in approximately 30,000 cases. In 1983 he received an award from the New York Bar Association for the outstanding delivery of defense services.

45. Professor Hellerstein testified that in his entire practice he never once turned down a client's request to bring an appeal because he believed it was frivolous, if he felt there was anything that could be argued. He agreed with Professor Freedman that while it may be frivolous to argue that the earth is

flat, it is not inappropriate to present such an argument because, hopefully, somewhere a judge might accept the argument. He has for this reason frequently presented arguments he did not believe in both to persuade the court and for the further purpose of preserving a point for appeal to a higher court. Professor Hellerstein distinguished as unacceptable a sham argument which he defined as one "that could not be based legitimately on the record in the case." He did not regard the appeals filed by Mr. Solerwitz to be shams. Professor Hellerstein stated that he had served on a bar grievance committee and further said: "I have not seen any appellate court act against an attorney for perfecting an appeal in the manner in which these cases were perfected."

46. Professor Hellerstein would not the doctrine of stare decisis interfere with a lawyer's duty to make a good faith argument

for an extension, modification, or reversal of a legal precedent. If the Supreme Court has denied certiorari on an issue, since such a decision is not on the merits, it is proper in his view to continue to insist on reconsideration of an issue previously decided unfavorably to his case, because the court may later change its mind about it, if given the opportunity to do so. This possibility may be enhanced by a change in the membership of the court. He referred to reversal of precedents in civil rights and criminal charges. The professor said that "what is today's joke is tomorrow's constitutional principle," and "the rights under the [C]onstitution are the rights of the individual."

47. In the opinion of Professor Hellerstein, the sanctioning of lawyers is not an appropriate means of achieving docket control. "... I don't think that docket

control can be the business of an appellant lawyer." In multiple cases involving the same issue he would file one brief, and additional briefs would incorporate legal arguments by reference to the first brief. The additional briefs would also provide the fact-specific aspects of each client's case. Had he been consulted by Mr. Solerwitz upon the latter's receipt of the court's communications about his cases, he would not have advised him to abandon his clients just because of the decisions in the lead cases. In his opinion, the court was asking counsel to "close the courthouse door" on his clients. To do so might subject counsel to a malpractice claim and would waive certiorari to the Supreme Court. The lawyer's legal and ethical obligation was stated to be that of persisting in appeals as clients demanded.

48. Mr. Harvey A. Silverglate was the third and final witness called as an expert on behalf of Mr. Solerwitz. Mr. Silverglate, a graduate of Harvard University Law School in 1967, is engaged in the private practice of law as a partner in the Boston firm of Silverglate, Gertner, Baker and Fine. For 7 years he taught a course at Harvard in professional responsibility. Since its creation 8 years ago, he has served as chairman of the Standing Committee on Legal Ethics of the Massachusetts Association of Criminal Defense Lawyers. In connection with these responsibilities Mr. Silverglate has frequently been consulted by lawyers about their problems with clients and courts and has represented some of these lawyers.

49. In preparation for his testimony, Mr. Silverglate read the court's notices to Mr. Solerwitz and stated, "I have skimmed a couple

of briefs and the appendices and some other papers filed in the case." He gave it as his professional opinion that those briefs filed by Mr. Solerwitz complied with the orders of the court. He made specific reference to the brief filed in Adsit v. Department of Transportation, FAA, No. 85-1639 (Fed. Cir. July 16, 1986) (unpublished). He noted in that case, involving 32 petitioners, that there were pages distinguishing each client's facts from those in the decided lead cases, and there was a separate section arguing legal errors. Mr. Silverglate observed that the brief was "uncommonly structured" in that the legal argument preceded the facts and suggested that this could have caused the court "to look to the common legal arguments rather than to the fact-specific fact arguments."

50. Mr. Silverglate remarked upon what he described as the "chaotic situation" faced by Mr. Solerwitz, arising from the circumstances outlined in testimony that the court failed to make timely rulings on motions to waive the appendices or to grant permission to file briefs which exceeded the page limits permitted by the rule. He said that confusion was understandable, however, given the court's denial of the motions and the short time limits in which to file. He expressed puzzlement as to why the court would not waive appendices or permit overlong briefs, given multiple similar cases which it seemed expedient to consolidate. It was his view that the motions were reasonable and if granted would have been a benefit to the court as well as to the air controllers. He speculated that the problem may have arisen

with a misunderstanding of the situation by the clerk or a lack of adequate communication between the clerk and Mr. Solerwitz.

51. In the opinion of Mr. Silverglate, Mr. Solerwitz could not withdraw from the cases just on account of adverse decisions in the lead cases and that he had an ethical obligation to persist in the appeals given the insistence of the clients and the obligation to get decisions, although expected to be adverse, so that the right to seek certiorari would be protected. He did not regard the appeals to be frivolous under these circumstances. While agreeing with Professor Freedman's definition of frivolity, he testified: "My own office informally has what we call the giggle test. You discuss the issue, the position you are going to take, it nobody giggles it passes muster." Mr. Silverglate knew of no judicial precedent

which would have suggested to Mr. Solerwitz that if he pursue the appeals he would be disciplined. In his opinion, case law and the lore of the profession was to the contrary and any sanctions imposed would "chill lawful vigorous advocacy." He suggested, therefore, that in some situations it is the duty of the lawyer "to brave . . . even judge's views that what the lawyer is doing is frivolous."

52. None of the expert witnesses rejected the employment of the lead case procedure to deal with hugh numbers of cases. Professor Freedman indicated he would do so only if if prevented evaluation of the individual facts of each claimant's case. None of the experts rejected consolidation of appeals. The MSPB employed both procedures in dealing with over 10,000 air traffic controller appeals. The court's notice to all attorneys in the air controller cases on February 24, 1983, stated:

"[I]n view of the large number of cases, it is appropriate that this court first determine the common controlling legal issues as soon as possible and thus avoid repetitious and unnecessary decision of the same issues in many cases." The court indicated that it would follow the MSPB's practice of consolidation, identification, and decisions in test cases containing similar issues. In his requested findings and conclusions Mr. Solerwitz did not point to any objection made to the court as to these procedures before the lead cases were decided. The court in its decisions addressed each petitioner's allegations individually by reference to precedents where similar fact and legal issues had been decided.

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

Miscellaneous Docket No. 145

IN RE JACK B. SOLERWITZ

---

DECIDED: June 17, 1988

---

Before MARKEY, Chief Judge, FRIEDMAN, RICH, DAVIS, SMITH, NIES, NEWMAN, BISSELL, ARCHER, and MAYER, Circuit Judges.*

FRIEDMAN, Circuit Judge.

These are exceptions by Jack B. Solerwitz, a member of the bar of this court, to the findings and recommendation by Senior Judge Marion T. Bennett that Mr. Solerwitz be disciplined for engaging in conduct unbecoming a member of the bar of this court, in violation of Rule 46(b) of the Federal Rules of Appellate Procedure. Judge Bennett recommended that Mr. Solerwitz be suspended

---

*Because of illness, Circuit Judge Davis took no part in the decision of this case. Circuit Judge Michel took no part in the consideration or decision of this case.

from practice before this court for two years, but that enforcement of the suspension be held in abeyance for two years, "pending his demonstration or rehabilitation during probation."

We agree with and adopt Judge Bennett's determination that Mr. Solerwitz engaged in conduct unbecoming a member of the bar of this court. We modify the proposed disciplinary action to a suspension for one year, but reject the recommendation that the suspension be held in abeyance. Our order of suspension will be effective ninety days from the date of this order.

I

This court instituted this proceeding an in banc order directing Mr. Solerwitz to "show cause why he should not be suspended for two years from representing clients before this court." The proceeding resulted from Mr.

Solerwitz's conduct in representing a large number of former air traffic controllers in their appeals to this court from decisions of the Merit Systems Protection Board (Board) upholding their removals because of their participation in the 1981 illegal air traffic controllers strike. After Mr. Solerwitz filed in this proceeding various motions that the court denied -- including motions to disqualify all members of the court and to stay the proceedings -- Senior Judge Bennett was appointed to conduct the hearing that Mr. Solerwitz requested. Following the hearing, Senior Judge Bennett filed a lengthy opinion and made 52 detailed findings of fact, on the basis of which he made his recommendation described above.

A. The background facts, as set forth in Judge Bennett's findings and opinion, are uncontradicted. The government dismissed more

than 11,000 air traffic controllers for their participation in the illegal strike. More than 10,000 of them appealed to the Board. Following the Board's decisions, approximately 4,600 petitions for review were filed in this court. Many of these petitions covered cases that the Board had consolidated and many which the court consolidated.

Because of the extraordinarily large number of these cases, the court, in consultation with counsel who elected to participate, designated twelve of them as "lead cases," which it believed to present most of the legal issues that were common to the air traffic controllers' appeals. Those twelve cases were scheduled for expeditious briefing and oral argument. On February 24, 1983, all other pending air traffic controller cases were suspended.

Mr. Solerwitz, who initially represented between 800 and 1,000 air traffic controllers before the Board, filed appeals with this court for 736 controllers. As a result of the consolidation of appeals, Mr. Solerwitz had pending before this court 154 petitions for review. He was sole counsel in one of the twelve lead cases.

On May 18, 1984, the court decided the twelve lead cases. Schapansky v. Department of Transp., and related cases, 735 F.2d 477-549, cert. denied, 469 U.S. 1018 (1984). On the same date, the court sent a notice to the attorneys and the petitioners in the other air traffic controller cases that it would notify them upon the final disposition of the lead cases, that within 30 days of the notification they must given written notice to the court if they wished to continue to prosecute their appeals, and that failure so to notify the

court would result in dismissal of the appeal. "The notice to counsel and petitioners included, among other matters, copies of the court's opinions in the lead cases and directed attention to the impropriety of maintaining frivolous appeals, citing published cases of the court on that issue." Finding 4.

Finding 5 and a portion of finding 6 stated:

> On December 10, 1984, in conformity with the May 18, 1984 notice, counsel and petitioners in all ATC cases were notified that the Supreme Court had denied certiorari in all lead cases in which it had been sought and that mandates had been issued in those cases from this court to the MSPB. This notice also advised that the suspension entered on February 24, 1983, would remain in effect to and including January 10, 1985. Before the latter date, pending petitions for review were required to be withdrawn or new ones filed. Absent such action the petitions would be dismissed. A renewed petition was required to contain "a statement of the issues

> relied on and not decided in any of the 'Lead Cases.'" The notice also indicated where the lead cases were published and again emphasized the impropriety of frivolous appeals, repeating the precedents cited in the May 18, 1984 notice.
>
> ... On July 12, July 31, and August 30, 1985, the court by memorandum requested all ATC counsel to review the propriety of maintaining appeals in light of the need to avoid frivolity and the accompanying abuse of the judicial process. With each of the five notices in 1984-85 the court furnished counsel with a set of published lead cases or citations thereto.

B. The order to show cause made the following allegations:

> Mr. Solerwitz was thus repeatedly and expressly warned by this court against filing and maintaining frivolous appeals in air traffic controller cases that presented legal issues and fact patterns indistinguishable from those presented and decided in the precedents represented by the Lead Cases. Ignoring those warnings, Mr. Solerwitz, who was sole counsel in one Lead Case, maintained 11 frivolous appeals pending on May 18, 1984 and filed and maintained another 131 separate frivolous appeals in air traffic controller cases. In his briefs in those

appeals, 107 of which were virtually identical, Mr. Solerwitz disregarded Federal Rules of Appellate Procedure and this court's rules, failed to file appendices, provided no citations to the record, ignored authorities cited by the government, advanced numerous arguments on issues not on appeal, and repeatedly raised contentions not raised before the Merit Systems Protection Board. Mr. Solerwitz' briefs were devoid of any showing on which the decision appealed from could even possibly be reversed, devoid of any basis on which the precedents of this court could be distinguished in law or fact, and devoid of any effort to make such distinctions, in total disregard of this court's written instructions of December 10, 1984.

. . . .

Mr. Solerwitz' conduct in filing and maintaining frivolous appeals having no colorable basis in fact or law has wasted the time and limited resources of this court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process. Mr. Solerwitz' conduct has been "unbecoming a member of the bar of the court," Fed. R. App. P. 46 (b).

The court decided approximately 140 cases in which Mr. Solerwitz was counsel, each in a separate opinion. The court determined that the vast majority of those appeals were frivolous and imposed upon Mr. Solerwitz total sanctions of $78,300 for filing and maintaining frivolous appeals.

In Des Vignes v. Department of Transportation, 791 F.2d 142 (Fed. Cir.), cert. denied, 107 S.Ct. 185 (1986), one of the cases in which a penalty ($1,000 in that case) was imposed upon Mr. Solerwitz for filing a frivolous appeal, the court described in detail the ways in which Mr. Solerwitz had engaged in "Abuse of the Judicial Process." Id. at 145. The court there stated:

> Except for a paragraph or two relating to individual air controllers, 107 of those briefs are virtually identical to that filed in this case. That they are copies is indicated by the presence of the same typographical errors in each, and by the failure to distinguish between appeals involving one

petitioner from those involving multiple petitioners. Each contains the same type of patently frivolous constitutional arguments, rejected contentions, and unsupported assertions of fact discussed above. Each disserves the court in violating the rule requiring citations to the record. The court was required to check the record and was required to read, and has read, all 131 sets of briefs, in an effort to insure against the possibility that a meritorious appeal might otherwise be overlooked....

Respondent prepared briefs in response to each of counsel's 131 virtually identical briefs. Counsel's failure to refer to the record forced Respondent to do the work incumbent upon counsel. Counsel's failure to supply an appendix in some cases forced Respondent to do so in those cases. Respondent cited the frivolous, rejected, and unsupported contentions discussed above. Respondent also cited counsel's frequent, repeated, and brazen violations of this court's rules. Mr. Solerwitz' reply briefs simply ignored those citations, merely stating that the earlier cases were distinguishable (but citing no distinguishing factors), ignored Respondent's charge that he had failed to cite to the record, and stated that the appeal was filed to give Des Vignes access to the court. Faced with clear and insurmountable

> indication that all 131 appeals were frivolous, Mr. Solerwitz had continued to maintain this and the other 130 appeals.

Id. at 145-46 (emphasis in original) (footnotes omitted).

C. At the hearing, Mr. Solerwitz, represented by counsel, presented seven witnesses. Four of them testified with respect to the facts. The other three, experts in legal ethics, gave and explained their opinions on the propriety of Mr. Solerwitz's conduct. Mr. Solerwitz did not testify, but relied upon an affidavit he previously had submitted in support of his motion, noted above, to disqualify all of the judges of this court, which he requested the court to consider as his answer to the Order to Show Cause if the court denied his motion.

One of the four fact witnesses was Mrs. Solerwitz, Mr. Solerwitz's wife and law partner, who "was active in handling claims of

air controllers represented by her firm." Finding 21. She described in detail the work involved in handling the cases and the procedural and other problems involved, characterized the court's requirement of filing "hundreds of appendices as 'a nightmare' and 'impossible' within such a limited time as allowed by the court," Finding 25, and stated that it was "the view of the firm, and all of its clients who appealed, that it was important to get a final individual judgment in each case to preserve each client's right to apply for certiorari to the Supreme Court if relief was not otherwise granted." Further, according to Mrs. Solerwitz, some clients expressed hope for a congressional political solution to their claims for restoration to duty if no judicial remedy was forthcoming." Finding 32.

The three other fact witnesses were former air traffic controllers whom Mr. Solerwitz represented before the Board and the court. They testified that they had insisted that Mr. Solerwitz proceed with his or her appeal to the court. Findings 33, 35 and 37. The court imposed sanctions upon Mr. Solerwitz in each of those cases, which it found frivolous. The witnesses testified that Mr. Solerwitz's standard fee for handling these cases was $750 for Board proceedings and $2,500 additional for the court proceedings, but only one of them paid the full fee. Counsel for Mr. Solerwitz "made an offer of proof that if the other 14 former ATC clients identified as potential witnesses in the pretrial response were called, their testimony would correspond to that of" those three former controllers. Finding 19.

The three expert witnesses, all of whom Judge Bennett found to be "experts in the field of legal ethics and professional responsibility" (Finding 20), were Professor Monroe H. Freedman of Hofstra University Law School, Professor William E. Hellerstein of Brooklyn Law School, and Harvey A. Silverglate, a practicing lawyer in Boston, Massachusetts. The three experts were all of the opinion that Mr. Solerwitz's conduct in the air traffic controller cases was proper and did not involve professional impropriety. Judge Bennett summarized their testimony in detail in Findings 39 through 51.

Professor Freedman stated that "as long as counsel in good faith believes that his case is not frivolous, that it is his duty to proceed with it notwithstanding any instructions to the contrary from a court" and that "the court is required to bend over

backwards to defer to counsel's judgment with regard to what is filed and what is argued...." As Judge Bennett found, Professor Freedman "regards as frivolous only a paper that is fallacious on its face as distinguished from a sham pleading in which the argument is plausible but the lawyer knows or should know that the underlying facts are not there to support it." Finding 40. Judge Bennett accurately summarized Professor Freedman's view in the following statement in finding 41: "Had Professor Freedman been consulted by Mr. Solerwitz on whether to go forward with appeals in view of the decisions in the lead cases and the court's warnings about frivolous appeals, he would have advised that if the clients wished to proceed it was Mr. Solerwitz's ethical duty as a lawyer to do

so and that this would especially be so if the appeals could be distinguished from the lead cases."

Professor Hellerstein's opinion was that "a lawyer has an obligation to persist in making and remaking the same argument to an intermediate court at least until the Supreme Court has foreclosed that court on the merits[.]" Professor Hellerstein testified that if Mr. Solerwitz had consulted him in 1984 and told him "of the warnings that he had received against filing frivolous appeal" and if Mrs. Solerwitz had told him about the problems facing her firm in handling the cases and about the discharged air traffic controllers' insistence on going ahead with the appeals, "I would have told him to go ahead and to seek if possible either through motions, some accommodation with respect to the rule or find someone that was available to

explain what was on the court's minds." Judge Bennett stated in Finding 45 that "Professor Hellerstein testified that in his entire practice he never once turned down a client's request to bring an appeal because he believed it was frivolous, if he felt there was anything that could be argued which he defined as one 'that could not be based legitimately on the record in the case.' He did not regard the appeals filed by Mr. Solerwitz to be shams."

Mr. Silverglate testified that he "agee[d] with Professor Freedman's definition on frivolity" and did "not consider the legal arguments made [by Mr. Solerwitz] to be frivolous." Judge Bennett found that "[i]n the opinion of Mr. Silverglate, Mr. Solerwitz could not withdraw from the cases just on account of adverse decisions in the lead cases and that he had an ethical obligation to

persist in the appeals given the insistence of the clients and the obligation to get decisions, although expected to be adverse, so that the right to seek certiorari would be protected" (Finding 51).

D. Judge Bennett rendered a comprehensive and scholarly opinion. Drawing upon In re Bithoney, 486 F.2d 319 (1st Cir. 1973), discussed below, in which the court of appeals upheld a lawyer's suspension from practice for filing a number of successive frivolous applications, Judge Bennett stated that Mr. Solerwitz's conduct was similar to that involved in Bithoney. Judge Bennett pointed out that "[t]he facts of the present proceeding involve the continued filing and maintenance of multiple frivolous appeals" and stated that "the central focus here is whether the entire course of conduct by Mr. Solerwitz, taken as a whole, amounts to conduct

unbecoming a member of the bar of this court which warrants further discipline in addition to the sanctions previously imposed."

Judge Bennett stated that Mr. Solerwitz, "through the testimony of his expert witnesses, makes almost identical arguments [to those in Bithoney] in the present proceeding." Judge Bennett concluded that:

> The views of the expert witnesses, while based in part on established tenets of the legal profession, do not fully outline the duties of a lawyer nor do they provide a complete picture of the specific issues before the court in this proceeding. An attorney's obligations to provide zealous advocacy on behalf of his client are not absolute and uncompromising, but must be viewed in light of his additional obligations as an officer of the court to promote the administration of justice and to comply with the court's rules, notices, and orders. Additionally, as with his obligations to his client, the attorney's obligations to the court are ongoing at every stage of the litigation and the attorney must continually reevaluate the positions advanced in light of both the development of the

litigation itself and of the relevant case law affecting the litigation. [Footnote omitted.]

Judge Bennett noted the court's criticism of Mr. Solerwitz's briefs in Des Vignes, supra, and pointed out that

> his briefs were found to exhibit general and striking failures to cite or distinguish contrary authority, to distinguish the facts of the appeal from prior cases, to respond to contrary arguments of the respondent, or to even refer to the record. These conclusions are confirmed by an independent review of the Solerwitz briefs conducted as part of this proceeding which indicates, by clear and convincing evidence, that his attempts to comply with the court's ;notices, rules and instructions were dramatically deficient in each of the respects noticed in the order to show cause. All of these failures are even more striking when viewed in the face of numerous notices of the court cautioning against such behavior by counsel. [Citation omitted.]
>
> Thus, the simple fact remains, as born out by the opinions of this court in each individual appeal, that the briefs filed by Mr. Solerwitz fell short of meeting an objective standard of non-frivolity.

Judge Bennett rejected as "both inaccurate and unsympathetic" Mr. Solerwitz's "claim that the chaos that apparently characterized the Solerwitz law office during the period in question was solely due to the court's inaction and excessive delay in responding to his motions." See the portions of Judge Bennett's opinion quoted at the end of part IIA, below.

Judge Bennett concluded:

> On the basis of the findings, this opinion, and cited authority, it is therefore concluded that clear and convincing evidence supports the determination that Mr. Jack B. Solerwitz's continued course of conduct in filing and maintaining multiple frivolous appeals in the face of this court's orders, notices, instructions, rules, precedents, and previous sanctions constitutes conduct unbecoming a member of the bar of the United States Court of Appeals for the Federal Circuit. It is further concluded that Mr. Solerwitz has not rebutted the order to show case.

Mr. Solerwitz filed exceptions to Judge Bennett's findings and opinion and a brief, and we heard oral argument by his counsel.

II

A. Mr. Solerwitz's principle challenge to Judge Bennett's recommended decision is that Judge Bennett failed to give proper weight to the conclusions of the three expert witnesses on legal ethics that the appeals Mr. Solerwitz pursued were not frivolous, and that Mr. Solerwitz was fully warranted, if not required, to proceed with the appeals in view of his clients' insistence that he do so. He urges that the court "should not be the sole arbiter" whether an appeal is frivolous, but "must use as a standard the test that a brief is frivolous only where no judge or responsible expert in the field would venture the opinion that the brief is not frivolous. Here it is not only Mr. Solerwitz who believes

these briefs are not frivolous but also three experts who are frequently and respectfully called upon to made [sic] such judgments."

Mr. Solerwitz states that "[t]he quintessential issue posed by this case is thus whether, when the Court and ethics experts fundamentally disagree as to whether an attorney's actions on behalf of his clients constitutes 'conduct unbecoming a member of the bar,' suspension, in addition to financial sanctions, is appropriate.... He further maintains that, in light of the disagreement between this Court and the ethical experts, to impose the sanction of suspension in a case where reasonable and knowledgeable people disagree on whether his actions were unbecoming a member of the bar will have a chilling effect on creative lawyering, will

stifle reconsideration of precedent and will be generally detrimental to our system of justice."

We have reviewed the testimony of the three experts and their conclusions regarding the propriety of Mr. Solerwitz's conduct. We agree with Judge Bennett's conclusion, however, that despite the opinion of those experts, Mr. Solerwitz engaged in conduct unbecoming a member of the bar of this court in his handling of the air traffic controller appeals.

Contrary to Mr. Solerwitz's contention, it is this court and not Mr. Solerwitz's experts that must determine whether Mr. Solerwitz's conduct was improper. As a member of the bar of this court, Mr. Solerwitz, in Judge Bennett's words, was required to "promote the administration of justice and to comply with the court's rules, notices and

orders." On five separate occasions, the court had warned all counsel in the air traffic controller cases against further pursuit of frivolous appeals in cases that could not be meaningfully distinguished from the lead cases. Despite there warnings, Mr. Solerwitz continued to press more than 100 appeals that were frivolous. Mr. Solerwitz cannot escape responsibility for his action by the assertions that his clients insisted that he pursue their appeals and that he believed he could draw adequate factual distinctions between his cases and the lead cases.

The expert witnesses' conclusions were stated in general terms and did not address the specific grounds upon which, in previously imposing the sanctions upon Mr. Solerwitz, this court had concluded that Mr. Solerwitz's appeals were frivolous. It bears repeating that Mr. Solerwitz filed 107 briefs that were

virtually identical and that merely repeated the same arguments that this court already had rejected in the lead cases. The purported short factual distinctions he sought to draw between the situations of the former controllers in the 131 cases and those in the lead cases were wholly unconvincing and did not provide any meaningful basis for distinguishing the lead cases.

Mr. Solerwitz did not inform the court that the legal discussions in all of those briefs were identical, including, as the court noted in Des Vignes, "the same typographical errors in each." 791 F.2d at 146. The result, as there pointed out, was that this court "was required to check the record and was required to reach, and has read, all 131 sets of briefs, in an effort to insure against the possibility that a meritorious appeal might otherwise be overlooked." Id. at 146.

This is not a situation in which a lawyer makes an argument that a court previously had rejected, in an attempt to persuade the court that its previous decision was erroneous and should be reconsidered and overruled. As the expert witnesses indicated, that is an accepted, necessary, and desirable part of advocacy. Here, however, the court (by an augmented panel of five judges) had decided the twelve lead cases in an endeavor to determine the controlling principles that would govern the bulk of the air traffic controller appeals. The court expressly warned counsel who pursued the remaining appeals that they must distinguish their cases from the lead cases and that an appeal that failed to do so would be deemed frivolous. In response to this warning, other lawyers withdrew a large number of air traffic controller appeals.

Mr. Solerwitz's briefs, however, did not attempt to convince the court that the lead cases, decided only a short time earlier, had been incorrectly decided and should be overruled. Instead, he merely repeated the same basic arguments that the court had rejected in the lead cases.

Mr. Solerwitz complains that Judge Bennett did not include among his findings of fact any finding that the appeals were frivolous. Perhaps Judge Bennett concluded that that determination was not properly included among the findings of fact. Judge Bennett's opinion, however, leaves no doubt that he determined that the appeals were frivolous. Judge Bennett stated that "[t]he facts of the present proceeding involve the continued filing and maintenance of multiple frivolous appeals," that Mr. Solerwitz had "abuse[d] ... the legal process by frivolous

filings." that Mr. Solerwitz's briefs "fell short of meeting an objective standard of nonfrivolity," and his opinion referred to Mr. Solerwitz's "continued course of conduct in filing and maintaining multiple frivolous appeals."

Like Judge Bennett, we conclude that In re Bithoney, 486 F.2d 319 (1st Cir. 1973), supports our determination here. Although, as Mr. Solerwitz points out, the facts in that case are different from those here, the rationale of that decision is equally applicable here.

In Bithoney, an attorney filed within nine months nine petitions to review deportation orders. The effect of filing was to stay deportation. In all nine cases the court dismissed the petitions, holding that they were frivolous, not diligently pursued, or both. In the first decision (which covered

three cases), the court sated: "This court does not propose to have appeals taken simply for the purpose of staying an enforcement of immigration orders, and when prosecution is not diligently pursued, the court presumes that this was the purpose." Id. at 320-21.

The court held that the attorney's "behavior in filing the immigration appeals was improper and worthy of disciplinary action." Id. at 322. It ruled that "the filing of nine petitions for review in immigration cases, some of which were not diligently pursued and none of which raised any substantial issue on review, which petitions caused automatic stays in deportation despite their lack of merit, and six of which petitions were filed after specific warning concerning the impropriety of

such conduct, constitutes behavior 'unbecoming a member of the bar of the court'." Id. at 325.

Although the present cases does not involve an attorney's failure to prosecute cases, which led the court in Bithoney to conclude that petitions to review had been filed solely to obtain an automatic stay of deportation, there are strong similarities between the two cases. In both cases the court concluded that the appeals were frivolous and in both cases the attorneys insisted on filing further appeals after the court had warned them not to do so. Indeed, in some respects Mr. Solerwitz's conduct was more egregious than Mr. Bithoney's. Mr. Solerwitz filed not nine but 131 frivolous appeals. In more than 100 of those he filed substantially identical briefs without informing the court of that fact, which

required the court (and government counsel) unnecessarily to read more than 4,000 pages of legal argument.

Mr. Solerwitz further argues, with the support of the expert witnesses, that his failure to comply with the court's rules and orders governing the filing and form of briefs and the filing of appendices was not his responsibility but resulted from the inability of his small law firm to comply with those requirements within the time deadlines. Judge Bennett correctly rejected this contention. He pointed out that

> [i]t is difficult to fathom how a 3-person practice, even in ideal circumstances, could adequately ... handle 154 court appeals for 736 individuals, given the relatively short time frame in which all of the actions arose. If the firm's personnel turnover and shortages were so severe as not to allow compliance with the briefing and record filing requirements of the court, Mr. Solerwitz should have referred some of his clients to other firms or taken alternative means to insure adequate

> representation for them. See [In re] Pritzker, 762 F.2d [532] at 533 [7th Cir. 1985] (proper course is to move to withdraw, not ignore court orders and seek indulgence in disciplinary proceeding); Bithoney, 486 F.2d at 323 & n.3 (illness not an excuse and merely informing clients of difficulty is not sufficient if attorney unable to fulfill obligations to court and client); McMorris v. State Bar, 29 Cal.3d 96, 623 P.2d 781, 171 Cal. Rptr. 829 (1981) (taking on too much work is not mitigating factor since condition is within the attorney's control).

B. Mr. Solerwitz also assails the proceedings before Judge Bennett as "procedurally defective." He points out that Rule 46(c) of the Federal Rules of Appellate Procedure provides that a court may take disciplinary action against an attorney only after a hearing (if one is requested, as Mr. Solerwitz did), and charges that the hearing before Judge Bennett was "a sham." Although Mr. Solerwitz's grounds for objection to the procedure are unclear, apparently they are

that there was no adversary hearing because no one appeared for the court and that "Judge Bennett failed to make any of the factual findings of which the hearing was ostensibly held."

To the extent that the latter argument is that Judge Bennett failed to make formal findings that the appeals were frivolous, we have already answered it. As indicated, the basic facts regarding what Mr. Solerwitz did are undisputed. The issue is whether Mr. Solerwitz's action constituted conduct unbecoming a member of our bar. Judge Bennett's detailed findings and lengthy opinion fully explained his reasons for answering that question affirmatively.

Mr. Solerwitz's objection that the proceedings were not truly adversary because no one represented the court is difficult to understand. Mr. Solerwitz cannot show and has

not shown that he was prejudiced because no attorney appeared on behalf of the court to cross-examine his witnesses and present argument against him. The order to show cause fully informed Mr. Solerwitz what the charges against him were and what he would have to refute. He introduced evidence at the hearing that attempted to justify his conduct. Judge Bennett, however, found those explanations and the expert witnesses' views on the propriety of Mr. Solerwitz's conduct unpersuasive -- a conclusion with which we agree.

The procedure followed in this case fully comported with Rule 46(c), which provides:

> A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

As that provision required, Mr. Solerwitz was given reasonable notice of the reasons why the court believed he had engaged in conduct unbecoming a member of this bar and the opportunity to show cause "to the contrary" at a hearing. Mr. Solerwitz's objections to the procedure followed in this case appears to be nothing more than his dissatisfaction that Judge Bennett did not accept the evidence which in his view established that his conduct in the air traffic controller appeals was proper.

III

As noted, Judge Bennett recommended that Mr. Solerwitz be suspended from practice before this court for two years but that "enforcement of the suspension of Mr. Solerwitz be held in abeyance for 2 years, pending his demonstration of rehabilitation during probation."

A. Although the order to show cause proposed a two-year suspension, we have concluded that a one-year suspension from practice constitutes "appropriate disciplinary action" under Rule 46(c). Mr. Solerwitz has been subjected to substantial monetary sanctions for the numerous frivolous appeals he has taken. Moreover, he has cooperated fully with the court in these proceedings. Although we agree with Judge Bennett that, because Mr. Solerwitz has engaged in conduct unbecoming a member of the bar of this court, disciplinary action in addition to those monetary sanctions is necessary, we think a less severe sanction than we originally proposed is appropriate.

B. We conclude, however, that the one-year suspension we are ordering should not be stayed. The reasons that have led us to conclude that such action against Mr.

Solerwitz (in addition to the monetary sanctions previously assessed against him) is necessary and appropriate, also require that the discipline be effective and subject Mr. Solerwitz to a tangible penalty. To impose a suspension and at the same time to stay its effectiveness for its duration as a practical matter would amount to no suspension at all and therefore to no meaningful discipline.

We recognize that this is an unusual case. As Judge Bennett noted, this is the first time that we have had to exercise our disciplinary authority under Rule 46(c) against a member of the bar of this court. Mr. Solerwitz may wish to seek Supreme Court review of our decision. To give him full opportunity to do so, our order suspending him from practice will become effective ninety days from the date of this decision. Cf. 28 U.S.C. §2101(c) (1982).

ORDER

Jack B. Solerwitz is suspended from practice before this court for one year for conduct unbecoming a member of the bar of this court. This suspension shall become effective ninety days from the date of this order. If within that period Mr. Solerwitz files with the Supreme Court of the United States a petition for a writ of certiorari to review this decision, the effectiveness of this order of suspension shall be further stayed pending the Supreme Court's disposition of the petition.

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

Miscellaneous Docket No. 145

IN RE JACK B. SOLERWITZ

Before MARKEY, Chief Judge, FRIEDMAN, RICH, SMITH, NIES, NEWMAN, BISSELL, ARCHER, and MAYER, Circuit Judges.

FRIEDMAN, Circuit Judge.

ORDER DENYING RECONSIDERATION

Jack B. Solerwitz has petitioned for reconsideration of our order dated June 17, 1988, that suspended Mr. Solerwitz from practice before this court for one year for having engaged in conduct unbecoming a member of the bar of this court. Mr. Solerwitz contends that the court improperly rejected the recommendation of Senior Judge Bennett, to whom the case was assigned for hearing and to make findings and recommendations, that Mr. Solerwitz be suspended for two years but that

the suspension itself be suspended and that Mr. Solerwitz be placed on probation for that period.

Mr. Solerwitz refers to the principle that it would be "wholly improper" for an appellate tribunal to "impose a harsher sentence than the one imposed by the trial court," and alleges that it also is "wholly improper for this Court to increase his punishment, a least without itself holding a hearing on that question." Mr. Solerwitz complains that "under the procedures established by this Court or the conduct of these proceedings, he has never had an opportunity to address the court on the subject of an appropriate penalty."

The order to show cause, which initiated these proceedings, informed Mr. Solerwitz that he faced a possible suspension from practice before this court for two years. Judge

Bennett's recommendation was that Mr. Solerwitz be suspended for that period. We reduced that recommended suspension to one year. The fact that we disagreed with Judge Bennett's further recommendation that the suspension itself be suspended cannot properly be viewed as an "increase" in Mr. Solerwitz's punishment. A suspension from practice for two years necessarily is a greater sanction than a suspension for one year.

Mr. Solerwitz's purported analogy between what happened in this case and an impermissible increase by an appellate court of a trial court's sentence fails because the two situations are not comparable. Judge Bennett was not functioning as an independent trial court, but as a master acting for this court to conduct a hearing and make proposed

findings and recommendations. His decision was only a recommendation, which we were free to change or modify as we deemed appropriate.

In his exceptions to Judge Bennett's recommended findings and decision, Mr. Solerwitz could have challenged the sanction, but failed to do so. He did not argue to us that a lesser sanction than Judge Bennett proposed would be appropriate, or that even if we upheld Judge Bennett's conclusion that Mr. Solerwitz had engaged in conduct unbecoming a member of our bar, any suspension should be stayed, as Judge Bennett had proposed.

As Mr. Solerwitz must have known, it was this court and not Judge Bennett that would determine the appropriate sanction. Not having addressed the sanction Judge Bennett proposed, Mr. Solerwitz cannot now be heard to

complain because we reduced the suspension from two years to one, but declined to stay the effectiveness of the suspension.

We have considered Mr. Solerwitz's arguments that the sanction proposed by Judge Bennett would be more appropriate and adequate. Those arguments, however, do not induce us to change our decision.

The petition for consideration is denied.

FOR THE COURT

Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
JUL 20 1988
FRANCIS X. GINDHART
CLERK

July 20, 1988
Date